SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 513

THE UNITED STATES OF AMERICA, APPELLANT

vs.

AMERICAN LIVESTOCK COMMISSION COMPANY; LEWIS BAREFOOT, TRADING AND DOING BUSINESS AS THE BAREFOOT COMMISSION COMPANY; CASSIDY SOUTHWESTERN COMMISSION COMPANY ET AL., ETC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA

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Citation in usual form showing service on Hall & Thompson and Fred E. Suits, filed September 24, 1928, omitted in printing.

4 In United States District Court Western District of Oklahoma

Notice of appeal

Filed September 24, 1928

The plaintiffs in the above entiled case are hereby notified that the defendants appeal from the decision of the court as rendered on the 28th day of July, 1928. Said appeal will be to the Supreme Court of the United States, in accordance with the citation as issued in this case on the 24th day of September, 1928.

ROY ST. LEWIS,
Counsel for Defendant.

Service of the above Notice of Appeal accepted this 24th day of September, 1928.

HALL & THOMPSON,
FRED E. SUITS,
Counsel for American Livestock Commission Company, et al.

[File indorsement omitted.]

3 In United States district court

In Equity No. 794

AMERICAN LIVESTOCK COMMISSION COMPANY AND OTHERS, PLAINTIFFS,

vs.

UNITED STATES, DEFENDANT

Bill of complaint

Filed April 14, 1926

To the honorable JOHN H. COTTERAL,
Judge of the United States District Court for the Western District of the State of Oklahoma:

Come now your plaintiffs, American Livestock Commission Company, a corporation; Lewis Barefoot, trading and doing business as the Barefoot Commission Company; Cassidy Southwestern Commission Company, a corporation; Chas. Fuson, trading and doing business as the Fuson Commission Company; E. T. Healy, E. J. Healy, jr., trading and doing business as Healy & Company; R. M. Johnson, Wm. H. Laux, and T. A. Campbell, a copartnership doing business under the firm name of Johnson-Laux-Campbell Live Stock Commission Company; Liberty Live Stock Commission Company, a cor-

poration; Claude Allen, trading and doing business as the Midwest Live Stock Commission Company; Oklahoma Live Stock Commission Company, a corporation; Scannell-Slitt Commission Company, a corporation; and the Stribling Commission Company, a copartnership composed of J. W. Stribling and J. B. Stribling; each of whom is a market agency, duly registered as such with the Secretary
6 of Agriculture under the packers and stockyards act of 1921; and Ralph Sullivant, C. J. McFarland, J. E. Cash, W. J. Goodson, W. H. May, O. J. Jones, Ben Kapp, and Jean Pryor, each of whom is duly registered with the Secretary of Agriculture as a dealer at the Oklahoma National Stock Yards, Oklahoma City, Oklahoma, under the packers and stockyards act of 1921, and individually and collectively show to the court:

I

That the plaintiffs herein designated as market agencies are corporations, partnerships and individuals, respectively, as severally stated, that they have the offices or places of business, respectively, at Oklahoma City, in the Western District of the State of Oklahoma; that said corporations and many of the individuals and partners comprising the plaintiffs designated as market agencies are residents and citizens of the State of Oklahoma; that said market agencies and each of them are individually engaged in business competition, one with the other, as agents and brokers for others in the buying and selling of livestock on commission at the Oklahoma National Stockyards at Oklahoma City, in the State of Oklahoma.

That the plaintiffs hereinbefore designated as dealers are residents of Oklahoma City, in the State of Oklahoma; that each, with the exception of the plaintiff, Jean Pryor, is, and was at all the times hereinafter mentioned, engaged in the business of buying and selling livestock at the Oklahoma National Stockyards at said city of Oklahoma City; that the said Jean Pryor was at the times
7 hereinafter stated engaged in business as such dealer at the said stockyards.

II

Plaintiffs further state that they, and each of them, individually and severally, bring this bill for and on behalf of themselves, individually and severally.

III

Plaintiffs further allege that the defendant is the United States of America, and is made the party defendant herein as provided by law in such cases, and for the reason that in its name it is administering, through the Secretary of Agriculture, the provisions of the act of Congress known as the packers and stockyards act of 1921 and the amendments thereto.

IV

Plaintiffs further show to the court that heretofore they were made respondents in a certain complaint and proceeding issued and instituted by the Secretary of Agriculture of the United States, and pending before the said Secretary of Agriculture, entitled "In re American Livestock Commission Company, and others," and known as "Docket Number 136." A copy of the said complaint is hereto attached, marked "Exhibit A," and made a part hereof.

That thereafter the plaintiffs filed their response to the said complaint of the said Secretary of Agriculture, a copy of which is hereto attached, marked "Exhibit B," and made a part hereof.

8 Plaintiffs further show to the court that a formal hearing was had upon the charges in said complaint brought against these plaintiffs and others as respondents; that said hearing was had before the Honorable B. T. Hainer, an examiner for the said Secretary of Agriculture; that at the said hearing testimony, both oral and documentary, was introduced upon the part of the Government of the United States, and upon the part of the plaintiffs herein and others as respondents in the said proceeding.

That thereafter, and on the thirty-first day of March, 1926, the said Secretary of Agriculture, "Upon consideration of the record" of said hearing, issued in said proceeding a certain "Findings of fact, conclusion, and order," a copy of which is hereto attached, marked "Exhibit C," and made a part of this bill in equity.

V

Plaintiffs further show to the court that in said "Findings of fact, conclusion, and order," the said Secretary of Agriculture finds and concludes that these plaintiffs

"Individually and in concert engaged in and used unfair and unjustly discriminatory practices and devices in connection with the handling, buying, or selling of live stock in commerce at said stockyards, as defined in Title III, section 312, of said act:

"That the said respondents above named and each of them have in the handling, buying, or selling of live stock in commerce at said stockyards individually and in concert engaged in a course of

9 conduct and done acts for the purpose and with the effect of restraining commerce in violation of said act, in this, to wit: That said above named respondents and each of them while freely dealing and engaging in and carrying on the business of buying or selling live stock in commerce at said stockyards between and among themselves, have persistently refrained and refused from handling, buying, or selling live stock from the Producers Commission Association, a cooperative market agency, and duly registered and qualified to transact business at said stockyards, and said respondents are continuing to and refusing and refraining from handling or buying live stock from said Producers Commission Association in

the usual and ordinary course of business at said stockyards, thereby unjustly and unfairly discriminating against said market agency to their prejudice and disadvantage."

And plaintiffs respectfully show to the court that said finding and conclusion upon the part of the Secretary of Agriculture is arbitrary, oppressive, and unreasonable; that there is no testimony in the entire record of said hearing under said complaint which tends to establish said findings and conclusions of the Secretary of Agriculture in this, to wit:

There is no testimony in the record of said hearing, or introduced at said hearing, which tends to show or upon which said Secretary of Agriculture might lawfully conclude or find that there had been or was any concert of action, conspiracy, or agreement between or among these plaintiffs or any two or more of them to refuse to buy from or sell to said Producers Commission Association.

There is no testimony in the record of said hearing, or introduced at said hearing, which tends to show that said plaintiffs, or either or any of them, had unfairly or unjustly discriminated against the said Producers Commission Association, or which tended to show that the said plaintiff had done acts for the purpose and with the effect of restraining commerce in violation of said packers and stockyards act of 1921.

VI

Plaintiffs further show to the court that in said "Findings of fact and conclusions" said Secretary of Agriculture further found and concluded as follows:

"That the said respondents above named and each of them have, in the handling, buying or selling in commerce at said stockyards individually and in concert engage in a course of conduct and done acts for the purpose and with the effect of restraining commerce, in violation of said act, in this, to wit: That said above named respondents and each of them, while freely dealing and engaging in and carrying on the business of buying and selling live stock in commerce at said stockyards between and among themselves, have persistently refrained and refused from handling, buying or selling live stock from the Bollinger & Spencer Livestock Commission Company, a market agency duly registered and engaged in the business of handling, buying or selling live stock at said stockyards until it ceased to do business on or about March 11, 1925, thereby unfairly discriminating against said market agency to its prejudice and disadvantage."

And your plaintiffs respectfully show to the court that said conclusion and finding is unfair, arbitrary, capricious, and oppressive; that there is no evidence in the entire record of the said hearing which tends to show that these plaintiffs or any two or more of them co-

spired or agreed or concerted to refrain from buying from or selling to the said Bollinger & Spencer Livestock Commission Company; or which tends to show that plaintiffs or any of them engaged in a course of conduct or performed acts for the purpose and with the effect of restraining commerce, in violation of the said act; or which tends to show that said plaintiffs or either of them in any way unfairly discriminated against said Bollinger & Spencer Livestock Commission Company to its prejudice and disadvantage.

VII

Plaintiffs further show to the court that in the said order of the Secretary of Agriculture the said Secretary of Agriculture ordered that the plaintiffs herein

"Cease and desist from engaging in and using any unfair or unjustly discriminatory practices or devices in connection with the buying and selling of live stock in commerce as defined in said packers and stockyards act at the Oklahoma National Stock-
12 yards, to the prejudice and disadvantage of the Producers Commission Association and of the Bollinger & Spencer Livestock Commission Company at the Oklahoma National Stockyards at Oklahoma City, Oklahoma, in violation of Title III of said act (1) by failing or refusing to buy live stock from or sell live stock to said Producers Commission Association and the Bollinger & Spencer Livestock Commission Company in the ordinary course of business or to enter into any business relations with them with respect thereto, while at the same time engaging in and carrying on business freely among themselves; (2) by combining or agreeing among themselves to refrain from buying live stock from or selling live stock to the Producers Commission Association and the Bollinger & Spencer Livestock Commission Association; and (3) in any other manner shown by the record."

Plaintiffs say that under that portion of said order numbered (1) said Secretary of Agriculture seems to order the plaintiffs, acting as individuals and acting individually, to cease and desist from failing and refusing to buy from or sell to the said Producers Commission Association and the said Bollinger & Spencer Livestock Commission Company.

Plaintiffs further respectfully show to the court that, acting as individuals, they have a lawful right to decide for themselves with whom they will or will not transact business, and that said order is unreasonable, arbitrary, illegal and oppressive, and that it is an infringement upon their rights as American citizens, deprives plaintiffs of their legal right of contract, and deprives plaintiffs of their business and property and property rights without due pro-
13 cess of law, in violation of the fifth amendment to the Constitution of the United States.

VIII

Plaintiffs further show to the court that as to that portion of said order of the Secretary of Agriculture numbered (2), there is no testimony in the entire record of said hearing which tends to support said order, or upon which to predicate or base said order; that there is no testimony in the entire record of said proceeding upon which to base a finding or conclusion that said plaintiffs or any two or more of them had acted in concert, collusion, conspiracy or agreement in failing or refusing to buy or sell to either the Producers Commission Association or the Bollinger Spencer Livestock Commission Company; that said Producers Commission Association, as is hereinafter more specifically set forth, has no power or authority to buy livestock from these plaintiffs or from any other source; that said portion of said order numbered (2) is arbitrary, unreasonable, oppressive, unreasonable, illegal, prejudicial to the rights and business of each of these respondents, and deprives these plaintiffs of their business and property and property rights without due process of law, in violation of the fifth amendment to the Constitution of the United States.

IX

Plaintiff further show to the court that that portion of the said order which is numbered (3), wherein the Secretary of Agriculture orders the plaintiffs to cease and desist from "engaging in and using any unfair or unjustly discriminatory practices or devices
14 * * * to the prejudice or disadvantage of the Producers Commission Association and the Bollinger & Spencer Livestock Commission Company * * * (3) in any other manner shown by the record," in unfair, unjust, vague, arbitrary, oppressive, and indefinite; that it does not apprise the plaintiffs of those acts which the Secretary of Agriculture purports to order them to cease and desist doing; that there is no finding of fact upon the part of the Secretary of Agriculture, no evidence in the record, and no allegations in the complaint filed by the Secretary of Agriculture upon which said "order" could be predicated; that same is a denial to these plaintiffs of the rights guaranteed to them as citizens of the United States by the Constitution and laws of the United States, and deprives plaintiffs of their business and property without due process of law, in violation of the fifth amendment to the Constitution of the United States.

X

Plaintiffs further show to the court that said findings, conclusions and order of the Secretary of Agriculture were based and predicated, if upon any evidence at all, upon incompetent, irrevelevant and immaterial and prejudicial testimony introduced at said hearing on said complaint over the objection and exception of the plaintiffs herein.

and each of them, and in violation of the legal and constitutional rights of these plaintiffs and each of them.

XI

Plaintiffs further show to the court that the said complaint of the Secretary of Agriculture alleged, and the evidence at the hearing thereon, conclusively showed that the said Bollinger & Spencer Livestock Commission Company had ceased to do business as a market agency prior to the filing of the said complaint; that the evidence at said hearing upon said complaint conclusively showed that said Bollinger & Spencer Livestock Commission Company had ceased to do business on account of a shortage or deficit in its "Proceeds account"—that is, the account in which is carried the funds belonging to the shippers and live stock owners for which it was agent—and that the business of said Bollinger & Spencer Livestock Commission Company was closed because it was indebted to its shippers in a sum greater than that which it had money or assets to pay, and that said condition was the reason for the cessation of business of the said company; that said evidence showed that the said Bollinger & Spencer Livestock Commission Company was a partnership composed of Charles J. Bollinger and W. C. Spencer, and that prior to the filing of said complaint and prior to the hearing thereon, said company and said partnership had been dissolved by the death of the C. J. Bollinger; and plaintiffs say that for these reasons the said order directing the plaintiffs to cease and desist from so-called unfair and unjustly discriminatory practices and devices against said company as set forth in the said order is arbitrary, unfair, unreasonable, oppressive, and inequitable, and could have no other effect than to prejudice the rights of these plaintiffs, to injure them in their business dealings or attempted business dealings with prospective shippers and buyers at the Oklahoma City Stockyards; and to injure them in their standing in the opinion of the public as reputable business men in their various and several and respective businesses.

XII

Plaintiffs further allege that the evidence in said hearing before the Secretary of Agriculture shows that the said Producers Commission Association is and has been at all times since its organization, an association organized under and by virtue of the provisions of chapter 181, of the session laws of the State of Oklahoma of 1923, approved March 19, 1923. Said chapter is by reference made a part of this bill in equity as fully as if herein set forth.

Plaintiffs further allege that by reason of the provisions of the said statute regulating and prescribing the functions and powers of associations organized thereunder said Producers Commission Associa-

tion could not qualify, and was not and is not a market agency under the terms and provisions of the packers and stockyards act of 1921 and as defined thereby. That for those reasons the said "order" of the Secretary of Agriculture directing these plaintiffs individually or collectively, or in concert, to cease and desist from certain alleged practices as set forth in the said "order" of the Secretary of Agriculture was and is illegal, arbitrary, unreasonable, and beyond the scope of the power or authority conferred upon the said Secretary of Agriculture by virtue of the provisions of the packers and stockyards act of 1921.

17 XIII

Plaintiffs further allege that by the provisions of the said statute under and by virtue of which the said Producers Commission Association has its legal existence, the said Producers Commission Association, at all times since its organization, and at the present time, could sell only the livestock of its members; that it could not sell livestock for any others than the members of said association, and only for them such livestock as its members might own as the producers thereof; that said association had and has no power or authority to buy livestock for itself, or as the agent, either of its members or other persons; that it could only perform the one service of selling livestock produced by its members; that the Secretary of Agriculture has no power to compel said association to buy livestock from these plaintiffs.

Plaintiffs further show to the court that the respective rights and powers and functions of buying and selling livestock as market agencies or dealers, as the respective plaintiffs may happen to be registered and engaged, were unrestricted.

Plaintiffs further state that the success of their various and several respective businesses as market agencies or dealers, as each of the plaintiffs may happen to be engaged, depends in a large measure upon the mutuality of their business dealing with other market agencies and dealers possessing like powers, authority, duties, and functions.

18 Plaintiffs further show to the court that if they are compelled to buy freely from said Producers Commission Association—which association, under the powers conferred upon it by the statute of its creation, can not purchase from these plaintiffs—they will thereby and to that extent be deprived of the opportunity and power to contract and carry on business dealings with those who can contract and carry on business dealings with these plaintiffs, to the great detriment of their several businesses. Plaintiffs allege that such a result and condition would inevitably follow the "order" of the Secretary of Agriculture; that said "order" is therefore unreasonable, arbitrary, oppressive, illegal, and deprives these plaintiffs and each of them of their business and property and property rights in violation of the fifth amendment to the Constitution of the United States.

XIV

Plaintiffs further allege that there is not anywhere in the evidence adduced at the hearing on the complaint filed by the Secretary of Agriculture any competent evidence to substantiate a finding or conclusion that these plaintiffs or any two or more of them conspired or acted in concert in failing or refusing to buy from or sell to the Producers Commission Association or the Bollinger & Spencer Livestock Commission Company; that there is no competent evidence to substantiate the conclusion or finding that the plaintiffs or any two or more of them had concerted or conspired to use any unfair or unjustly discriminatory practice or device in buying or selling or refusing to buy or sell from or to either the said Producers Commission Association or the Bollinger & Spencer Livestock Commission Company, to their or either of their disadvantage or prejudice; that there is no competent evidence to support the said order of the Secretary of Agriculture, and that same is arbitrary, capricious, oppressive, unreasonable, without authority of law, prejudicial to the respective rights of these several plaintiffs, and deprives these plaintiffs and each of them of their business and property without due process of law, in violation of the fifth amendment to the Constitution of the United States.

XV

Plaintiffs further allege that all the powers, authority, and duties of the Secretary of Agriculture with reference to the several businesses of these respective plaintiffs as market agencies and dealers is such as is conferred upon him by the said packers and stockyards act of 1921 and the amendments thereto; that nowhere in said original act, or the amendments thereto, is the power or authority conferred upon the said Secretary of Agriculture to prescribe the persons, firms, or corporations or association with whom these plaintiffs shall transact business, either in the buying or in the sale of livestock; that it is not within the scope of the power or authority of the said Secretary of Agriculture to direct that these plaintiffs, either as individuals or in concert, cease and desist from refusing to buy livestock from or sell livestock to either the Producers Commission Association or the Bollinger & Spencer Livestock Commission Company, or to make any other order which interferes with the free exercise of their right of lawful contract.

And plaintiffs say that for these reasons, as well as for the other reasons assigned in this bill in equity, the said "order" of the Secretary of Agriculture is illegal, arbitrary, oppressive, unreasonable and that it deprives the plaintiffs of their business, property and property rights without due process of law, in violation of the fifth amendment to the Constitution of the United States.

XVI

Plaintiffs further show to the court that by reason of said arbitrary and illegal order, the business of the plaintiffs, with the exception of the plaintiff, Jean Pryor, is being impaired; that said "Findings, conclusion, and order" is a reflection upon the honor, business standing, and integrity of each of the plaintiffs herein; that the business of each of the plaintiffs, for the most part, consists of personal services rendered to the customers and principals of these plaintiffs as agents and brokers, and in the absence of said customers and principals; that the services rendered by these plaintiffs for their customers and principals in the buying and selling of live stock are, as a result of the absolute necessity for expedition in the transaction of business of this character, consummated and rendered through parol or verbal contracts or agreements, which are not in the vast majority of cases enforceable at law, but which depend for their validity upon
21 the integrity and honor of those engaged therein; that the volume of business handled by each of these plaintiffs depends in a great degree upon the reputation of these plaintiffs for honesty and integrity in their business dealings, and the esteem in which they are held by the general public, and specially that portion of the public which is engaged in the production, purchasing, and sale of live stock; that if the said Secretary of Agriculture is not restrained from enforcing the said "order," the business standing and reputation for business integrity of these plaintiffs, the esteem in which they are held, and the confidence which they have heretofore enjoyed will be irreparably injured; that each of the plaintiffs may be illegally subjected to the penal provisions and punishments provided for in said packers and stockyards act of 1921, all of which is illegal, arbitrary, and oppressive, and in violation of the rights guaranteed to these plaintiffs as American citizens under the Constitution and laws of the United States.

XVII

Plaintiffs further allege that the undisputed evidence introduced at said hearing conclusively shows that, as a matter of law, the plaintiffs and each of them had full and legal justification, if any such justification be needed, for failing and refusing, either as individuals or in concert, to buy live stock from or sell live stock to said Producers Commission Association and said Bollinger & Spencer Livestock Commission Company, and the failure of the said Secretary of Agriculture to so hold as a matter of law was arbitrary, illegal, oppressive,
22 inequitable, and in violation of the respective rights of the plaintiffs and each of them under the Constitution and laws of the United States.

XVIII

Plaintiffs further allege that, although the plaintiff, Jean Pryor, was duly registered with the Secretary of Agriculture as a dealer on the Oklahoma National Stockyard at Oklahoma City, Oklahoma, and had at one time been actively engaged on said yards as a dealer in live stock, yet plaintiffs further allege that said Jean Pryor long before the said complaint was filed by the Secretary of Agriculture, and prior to September 8, 1924, the date when, under the allegations of the complaint, the alleged unfair practices began, the said Jean Pryor had ceased operations as such dealer and was not connected in any capacity with any other dealer or market agency at the said stockyards, all of which is conclusively shown by the evidence upon the said complaint; that there was no evidence which tended to any other or different effect.

That said order as to said Jean Pryor for said reason, as well as for the other reasons hereinbefore set out, is arbitrary, unreasonable, illegal, not based upon the evidence, prejudicial to the substantial rights of said plaintiff, and deprives said plaintiff of his business, property, and property rights without due process of law, and in violation of the fifth amendment to the Constitution of the United States.

XIX

Plaintiffs further allege that by reason of each and all of the
23 facts hereinbefore set forth the said order of the Secretary of Agriculture was and is illegal, null, and void; that a failure to observe and obey the said order, as hereinbefore stated, will subject the plaintiffs herein to civil or criminal action under the penal provisions of the said act; that a compliance with the said order would cause irreparable damage and loss to each of the plaintiffs; that the issuance, existence, and continuance in force of said order has caused and will cause irreparable injury and damage to the standing, reputation, business integrity, and business of each of the plaintiffs, as against all of which the plaintiffs have no adequate protection or remedy at law.

Plaintiffs further allege that they have no recourse save in equity, pursuant to the provisions of said packer and stockyards act, to secure an injunction restraining the enforcement of the said order.

Wherefore, being without remedy save in equity, plaintiffs bring this, their bill in equity, and for the reasons hereinbefore stated, plaintiffs and each of them, individually and collectively, pray:

First. That your honor grant unto plaintiffs writs of subpœna in chancery directed to the United States marshal of the District of Columbia commanding him to file a copy of this petition in the office of the Secretary of Agriculture of the United States and in the Department of Justice of the United States and to otherwise duly summon the defendant herein to appear and answer, but not under oath (answer under oath being specifically waived), the allegations

in the foregoing petition, and abide by such order and decree
24 as the court may make in the premises, and

Second. May it please your honor to grant unto your plaintiffs, and each of them, a writ of injunction directed to said defendant restraining it, its officers and agents, from the enforcement of said cease and desist order entered by the Secretary of Agriculture as aforesaid, and

Third. For such other and further relief as plaintiffs may be entitled to in the premises and as to the court may seem meet and proper.

FRED E. SUITS,
C. E. HALL,
Solicitors for Plaintiffs.

[*Duly sworn to by C. E. Hall; jurat omitted in printing.*]

25 *Exhibit A to complaint*

UNITED STATES OF AMERICA

BEFORE THE SECRETARY OF AGRICULTURE

PACKERS AND STOCKYARDS ADMINISTRATION

DOCKET NO. 136

IN RE AMERICAN LIVESTOCK COMMISSION COMPANY AND OTHERS, RESPONDENTS

Complaint and notice of hearing under Title III of the packers and stockyards act, 1921, and the amendment thereto

The Secretary of Agriculture, after a preliminary investigation, having reason to believe that the respondents herein have violated and are now violating the packers and stockyards act, 1921, and it appearing that a proceeding under said act in respect thereto would be in the interest of the public, issues this complaint and notice, stating the facts in that respect as hereinafter set forth.

1. That the respondents, American Livestock Commission Company; Lewis Barefoot, trading and doing business as Barefoot Live Stock Commission Company; Cassidy Southwestern Commission Company; Chas. Fuson, trading and doing business as the Fuson Commission Company; E. T. Healy and E. J. Healy, jr., trading and doing business as Healy & Company; Ingram Livestock Commission Company; R. M. Johnson, Wm. H. Laux, and T. A. Campbell, a copartnership, doing business and trading under the firm name of Johnson-Laux-Campbell Livestock Commission Company; Liberty Livestock Commission Company; Claude Allen, trading and doing business as Mid-West Livestock Commission Company; National

Commission Company; Oklahoma Livestock Commission Company; Scannell-Slitt Commission Company; and Stribling Commission Company are market agencies registered as such under the packers and stockyards act, 1921, and doing business as such at the Oklahoma National Stock Yards at Oklahoma City, Oklahoma.

2. That the respondents, H. C. Aldridge, Ed C. Baldridge, T. O. Bivin, J. S. Bogle, Ed Bohling, J. E. Cash, B. B. Clark, John Clark, W. E. Dabbs, C. E. Davis, T. J. Driggers, W. J. Goodson, A. A. Hamilton, Ben Kapp, E. H. Johnson, W. H. Johnston, C. J. Jones, Price L. Kendall, D. V. Lackey, W. T. Lobb, V. Long, Pat Maloy, jr., R. W. Martin, W. H. May, H. J. McCarron, C. J. McFarland, J. F. McGrath, J. W. O'Quinn, A. G. Pannell, T. J. Pannell, G. F. Patterson, Jean Pryor, E. G. Ramsay, H. C. Rice, C. E. Ridley, N. M. Scannell, Hurley Slitt, W. P. Spencer, Alex Steel, Ralph Sullivant, Fred Welter, Gilbert Wright, Kelly L. Wright, H. T. Wright, Ralph O. Wright, and Roger Wright, are dealers registered as such under the packers and stockyards act, 1921, and doing business as such at the Oklahoma National Stock Yards at Oklahoma City, Oklahoma.

3. That the Oklahoma National Stockyards at Oklahoma City, Oklahoma, is a public stockyards market in which live stock of all classes is bought and sold in commerce as defined in said act; and said stockyards has been found by the Secretary of Agriculture to be a "stockyard" as defined in Title III of said act, of which notice has been given the owner thereof and the public, as required by said act; that live stock is shipped and transported to said stockyards from various States for sale at said stockyards and is there sold, and a part of said live stock after purchase at said stockyards is shipped out of Oklahoma either as live stock or as meat or meat food products; that it is essential to maintain and preserve an open competitive market at said stockyards, and any interference or obstruction of the free flow of commerce in connection with the sale of live stock by market agencies and dealers depresses the prices of live stock to the prejudice and disadvantage of the sellers of live stock at said stockyards, which has the effect of restraining interstate commerce.

4. That substantially all the live stock sold in the Oklahoma National Stockyards is consigned by shippers thereof to the market agencies named as respondents in paragraph 1 hereof, and to the Producers Commission Association, a cooperative organization duly registered as a market agency and engaged in business at said stockyards under said act, and was consigned to the Bollinger and Spencer Livestock Commission Company up to March 11, 1925, at which time it ceased to do business as a market agency duly registered under said act. All the market agencies named herein were at the times hereinafter referred to engaged in the business of buying and selling live stock on a commission basis.

5. That on or about the 8th day of September, 1924, and at divers other times, the said respondents have individually and in concert

engaged in and used unfair and unjustly discriminatory practices and devices in connection with the buying and selling of livestock in commerce, as defined in said act, at the Oklahoma National Stockyards; that the said respondents and each of them have in the buying and selling of livestock in commerce individually and in concert engaged in a course of conduct and done acts for the purpose and with the effect of restraining commerce, in violation of said act in this, to wit: That the said respondents and each of them, while freely engaging in and carrying on business in commerce at the Oklahoma National Stockyards, Oklahoma City, Oklahoma, between and among themselves, have refused and refrained from buying livestock from, or selling livestock to, either the Producers Commission Association or to the Bollinger & Spencer Livestock Commission Company, and are continuing to refuse and refrain from buying livestock from or selling livestock to the said Producers Commission Association, and have thereby unjustly and unfairly discriminated against such market agencies to their prejudice and disadvantage.

6. That the foregoing acts were done for the purpose and with the effect of restraining commerce in the buying or selling of livestock at said stockyards and for the purpose of driving out of business the said Producers Commission Association, a cooperative market agency, and the said Bollinger & Spencer Livestock Commission Company, both active competitors of said respondents, and to prevent them from continuing to engage in the business of buying and selling livestock at said stockyards, all of which was and is to the prejudice and disadvantage of the producers and shippers who
28 sell or buy livestock at said stockyards, contrary to and in violation of Title III of the packers and stockyards act, 1921.

Therefore, notice is hereby given you, and each of you, the said respondents, that you may file an answer to this complaint on or before the sixth day of June, 1925, and that a hearing will be held for the purpose of investigating the matters and things set forth in this complaint before an examiner designated for the purpose, beginning on the sixteenth day of June, 1925, at ten o'clock a. m., at the Federal Building in Oklahoma City, State of Oklahoma, or such other place as may be designated for the purpose by said examiner and continuing from time to time in such place or other places as may be designated by the examiner until such hearing is completed, in which hearing you, and each of you, will have the right to appear and show cause why an order should not be made by the Secretary of Agriculture, requiring you, and each of you, to cease and desist from violating the packers and stockyards act, 1921, and further to show cause why an order should not be made suspending you, and each of you, for a reasonable specified period of time, for the reason and on account of the matters and things set forth in this complaint.

It is ordered that this complaint and notice be served by transmitting to each of the respondents a true copy thereof by registered mail.

In witness whereof the Secretary of Agriculture has hereunto set his hand and caused the official seal of the Department of Agriculture to be affixed in the city of Washington, District of Columbia, this 18th day of May, 1925.

W. M. JARDINE,
Secretary of Agriculture.

29 *Exhibit B to complaint*

UNITED STATES OF AMERICA

BEFORE THE SECRETARY OF AGRICULTURE

PACKERS AND STOCKYARDS ADMINISTRATION

DOCKET NO. 136

IN RE AMERICAN LIVESTOCK COMMISSION COMPANY AND OTHERS, RESPONDENTS

Answer to complaint

Come now the respondent, American Livestock Commission Company, and all other respondents named in the complaint in the above styled and numbered proceedings upon whom service of notice has been had, and for their answer to the complaint lodged against them, severally deny that on or about the 8th day of September, 1924, or at any other time, they, or any of them, individually or in concert with others, engaged in and used unfair and unjustly discriminatory practices or devices in connection with the buying and selling of live stock in commerce, as defined in the packers and stockyards act of 1921, at the Oklahoma National Stockyards, Oklahoma City, Oklahoma; and deny that respondents, or any of them, have, in the buying and selling of live stock in commerce, either individually or in concert with others, engaged in a course of conduct and done acts for the purpose and with the effect of restraining commerce, in violation of the packers and stockyards act of 1921; and deny that respondents, or any of them, while engaged in carrying on business in connection with the Oklahoma National Stockyards, Oklahoma City, Oklahoma, have refused and refrained from buying live stock from and selling live stock to either the Producers Commis-
30 sion Association or Bollinger and Spencer Livestock Commission Company; and deny that they or any of them have, at any time, refused to and refrained from buying live stock from and selling live stock to the said Producers Commission Association or Bollinger and Spencer Live Stock Commission Company, and that they, or any of them, have unjustly and unfairly discriminated against the market agencies named in the complaint to their prejudice and disadvantage.

The examiner's tentative findings and recommendations to the Secretary were issued on December 9, 1925, and thereafter on the request of counsel for the respondents an oral argument was made before the Secretary of Agriculture on February 18, 1926.

Findings and conclusion

Upon consideration of the record I find and conclude as follows:

34 1. That the respondents, the American Livestock Commission Company; Lewis Barefoot, trading and doing business as the Barefoot Live Stock Commission Company; Cassidy Southwestern Commission Company; Chas. Fuson, trading and doing business as the Fuson Commission Company; E. T. Healy and E. J. Healy, jr., trading and doing business as Healy & Company; Ingram Livestock Commission Company; R. M. Johnson, Wm. H. Laux, and T. A. Campbell, a copartnership doing business and trading under the firm name of Johnson-Laux-Campbell Live Stock Commission Company; Liberty Live Stock Commission Company; Claude Allen, trading and doing business as the Midwest Livestock Commission Company; Oklahoma Livestock Commission Company; Scannell-Slitt Commission Company; and the Stribling Commission Co., are market agencies duly registered as such under the packers and stockyards act, 1921, and are engaged in the business of buying or selling live stock in commerce at the Oklahoma National Stock Yards, Oklahoma City, Oklahoma; that the National Commission Company was a market agency duly registered as such and doing business at the Oklahoma National Stock Yards, Oklahoma City, Oklahoma, but that prior to the date of the hearing the said corporation had been legally dissolved;

2. That the respondents, Ralph Sullivant, C. J. McFarland, J. E. Case, W. J. Goodson, W. H. May, O. J. Jones, Ben Kapp, and Jean Pryor, are dealers and duly registered as such under the packers and stockyards act and are engaged in the business of buying or selling live stock in commerce on their own account or as the agents or employes of the vendors or purchasers at the Oklahoma National Stock Yards, Oklahoma City, Oklahoma;

3. That the Oklahoma National Stock Yards at Oklahoma City, Oklahoma, is a public stockyard market as defined in Title III of the packers and stockyards act, 1921, and said stockyard has been found by the Secretary of Agriculture to be a stockyard as defined in said act, due notice thereof having been given the owner thereof and the public as required by said act;

35 4. That live stock is shipped and transported to said stockyards from various States for sale at said stockyards for slaughter, and a part of said live stock after purchase or sale at said stockyards is shipped out of Oklahoma either as live stock or as meat or meat food products;

5. That it is essential that said stockyards, as well as all stockyards subject to the jurisdiction of the Secretary of Agriculture, maintain and preserve a free, open, and competitive market at said stockyards; and any interference or obstruction of the free flow of commerce in connection with the handling, purchase, or sale of live stock by market agencies or dealers depresses the prices of live stock to the prejudice and disadvantage of the sellers of said live stock at said stockyards and has the effect of restraining trade in interstate commerce;

6. That on or about the 8th day of September, 1924, the above-named respondents individually and in concert engaged in and used unfair and unjustly discriminatory practices and devices in connection with the handling, buying, or selling of live stock in commerce at said stockyards as defined in Title III, section 312, of said act;

7. That the said respondents above named, and each of them, have in the handling, buying, or selling of live stock in commerce at said stockyards individually and in concert engaged in a course of conduct and done acts for the purpose and with the effect of restraining commerce in violation of said act, in this, to wit: That said above-named respondents, and each of them, while freely dealing and engaging in and carrying on the business of buying or selling live stock in commerce at said stockyards between and among themselves have persistently refrained and refused from handling, buying, or selling live stock from the Producers Commission Association, a cooperative market agency, and duly registered and qualified to transact business at said stockyards; and said respondents are continuing to and refusing and refraining from handling or buying
36 live stock from said Producers Commission Association in the usual and ordinary course of business at said stockyards, thereby unjustly and unfairly discriminating against said market agency to their prejudice and disadvantage;

8. That the said respondents above named, and each of them, have, in the handling, buying, or selling in commerce at said stockyards, individually and in concert, engaged in a course of conduct and done acts for the purpose and with the effect of restraining commerce, in violation of said act, in this, to wit: That said above-named respondents, and each of them, while freely dealing and engaging in and carrying on the business of buying or selling live stock in commerce at said stockyards between and among themselves, have persistently refrained and refused from handling, buying, or selling live stock from the Bollinger & Spencer Livestock Commission Company, a market agency duly registered and engaged in the business of handling, buying, or selling live stock at said stockyards, until it ceased to do bunsiness, on or about March 11, 1925, thereby unfairly discriminating against said market agency to its prejudice and disadvantage;

9. While the record discloses certain irregularities on the part of the Oklahoma Producers Commission Association, yet the order of inquiry directed a hearing on alleged violations of the packers and

stockyards act by respondents, and such irregularities as were shown by the record are not material, since they do not justify concerted action on the part of respondents in restraint of trade. The Secretary is still free, however, to take whatever action against the Oklahoma Producers Commission Association he may deem warranted. Under all the circumstances and facts disclosed by the record it is felt that a cease and desist order is an appropriate exercise of the authority conferred by the statute.

Conclusion

10. It is essential to maintain and preserve a free, open, and competitive market to all stockyards subject to the jurisdiction of
37 the Secretary of Agriculture. The public interest requires that all live stock should be handled, purchased, or sold at these stockyards on their merits, irrespective of the ownership thereof or the agency which handles such live stock, whether they are members or non-members of live stock exchanges. There must be no discrimination among members and non-members of exchange or between the so-called "old line" selling agencies and the cooperative marketing associations who are non-members of exchange. It is of the utmost importance that these agencies shall perform their respective functions in such a manner as to afford equal opportunities to all persons who buy or sell live stock at these public stockyards and upon equal terms. This is the manifest purpose of the packers and stockyards act, 1921. Therefore, any combination or concert of action which obstructs or has the effect to obstruct or interfere with the freedom of commerce in the handling, buying, or selling of live stock in commerce at such public stockyards under the jurisdiction of the Secretary of Agriculture is a restraint of trade in commerce and is prejudicial to the owners and producers of live stock, and this is one of the chief evils which the packers and stockyards act, 1921, sought to prevent and remedy;

11. That the evidence sustains the charges made in the notice of inquiry against the following-named respondents: The American Live Stock Commission Company; Lewis Barefoot, trading and doing business as the Barefoot Live Stock Commission Company; Cassidy Southwestern Commission Company; Chas. Fuson, trading and doing business as the Fuson Commission Company; E. T. Healy and E. J. Healy, jr., trading and doing business as Healy & Company; Ingram Live Stock Commission Company; R. M. Johnson, Wm. H. Laux, and T. A. Campbell, a copartnership doing business and trading under the firm name of Johnson-Laux-Campbell Live Stock Commission Company; Liberty Live Stock Commission
38 Company; Claude Allen, trading and doing business as the Midwest Live Stock Commission Company; Oklahoma Live Stock Commission Company; Scannell-Slitt Commission Company; Stribling Commission Company; Ralph Sullivant; C. J. McFarland;

J. E. Case; W. J. Goodson; W. H. May; O. J. Jones; Ben Kapp; and Jean Pryor;

12. That all of the parties respondent were at one time registered and doing business at the Oklahoma National Stock Yards, Oklahoma City, Oklahoma, either as market agencies or dealers. However, many of the respondent dealers had ceased to do business long prior to the beginning of the boycott. Some of the respondents registered as dealers were at the date of the hearing, and for a long time prior thereto, employed by various respondent market agencies or dealers. In a few instances the respondent dealers did not refrain from trading, while in numerous cases no information could be obtained as to the whereabouts of particular respondents and registered letters mailed to them were returned unclaimed. The evidence is insufficient to support the charges against the following-named dealers: H. C. Aldridge, Ed. C. Baldridge, T. O. Bivin, J. S. Bogle, Ed Bohling, B. B. Clark, John Clark, W. E. Dabbs, C. E. Davis, T. J. Driggers, A. A. Hamilton, E. H. Johnson, Bride L. Kendall, D. V. Lackey, W. T. Lobb, V. E. Long, Pat Maloy, jr., R. W. Martin, H. J. McCarron, J. F. McGrath, J. W. O'Quinn, A. G. Pannell, T. J. Pannell, G. F. Patterson, E. G. Ramsey, H. C. Rice, E. C. Ridley, N. M. Scannell, Hurley Slitt, W. P. Spencer, Alex Steel, Fred Welter, Gilbert Wright, Kelly L. Wright, H. T. Wright, Ralph O. Wright, and Roger O. Wright.

Order

It is therefore ordered that the American Livestock Commission Company, Lewis Barefoot, trading and doing business as the Barefoot Live Stock Commission Company; Cassidy Southwestern Commission Company; Chas. Fuson, trading and doing business
39 as the Fuson Commission Company, E. T. Healy, and E. J. Healy, jr., trading and doing business as Healy & Company; Ingram Livestock Commission Company; R. M. Johnson, Wm. H. Laux, and T. A. Campbell, a co-partnership doing business and trading under the firm name of Johnson-Laux-Campbell Live Stock Commission Company; Liberty Live Stock Commission Company; Claude Allen, trading and doing business as the Midwest Live Stock Commission Company; Oklahoma Live Stock Commission Company; Scannell-Slitt Commission Company, and the Stribling Commission Company; Ralph Sullivant, C. J. McFarland; J. E. Cash, W. J. Goodson; W. H. May; O. J. Jones; Benn Kapp and Jean Pryor cease and desist from engaging in and using any unfair or unjustly discriminatory practices or devices in connection with the buying and selling of live stock in commerce as defined in said packers and stockyards act at the Oklahoma National Stock Yards, to the prejudice and disadvantage of the Producers Commission Association and of the Bollinger & Spencer Live Stock Commission Company, at the Oklahoma National Stock Yards at Oklahoma City, Oklahoma, in violation of Title III of said act (1) by failing or

refusing to buy live stock from or sell live stock to said Producers Commission Association and the Bollinger & Spencer Live Stock Commission Company in the ordinary course of business or to enter into any business relations with them with respect thereto, while at the same time engaging in and carrying on business freely among themselves; (2) by combining or agreeing among themselves to refrain from buying live stock from or selling live stock to the Producers Commission Association and the Bollinger & Spencer Live Stock Commission Association; and (3) in any other manner shown by the record.

It is further ordered that the case be dismissed against the following-named parties: National Commission Company (dissolved), a market agency formerly registered under the packers and stockyards act and doing business at the Oklahoma National Stock Yards;
40 and H. C. Aldridge, Ed C. Baldridge, T. O. Bivin, J. S. Bogle, Ed Bohling, B. B. Clark, John Clark, W. E. Dabbs, C. E. Davis, T. J. Driggers, A. A. Hamilton, E. H. Johnson, W. H. Johnston, Brice L. Kendall, D. V. Lackey, W. T. Lobb, V. E. Long, Pat Maloy, jr., R. W. Martin, H. J. McCarron, J. F. McGrath, J. W. O'Quinn, A. G. Pannell, T. J. Pannell, G. F. Patterson, E. G. Ramsey, H. C. Rice, E. C. Ridley, S. M. Scannell, Hurley Slitt, W. P. Spencer, Alex Steel, Fred Welter, Gilbert Wright, Kelly L. Wright, H. T. Wright, Ralph O. Wright, and Roger O. Wright;

Provided, however, that the dismissal of these proceedings against the above-named parties in their capacity as registered traders shall not in any way be construed as a dismissal of the charges against said parties or against any corporation, partner, or partnership with which they are now or were connected and which are registered and doing business as market agencies under the packers and stockyards act, 1921.

This order is to take effect at the termination of five days after receipt by the respondent of a copy hereof, which shall be transmitted by registered mail.

In witness whereof the Secretary of Agriculture has hereunto set his hand and caused the official seal of the Department of Agriculture to be affixed in the city of Washington, District of Columbia, this 31st day of March, 1926.

(Signed) W. M. JARDINE,
Secretary of Agriculture.

[File indorsement omitted.]

41 In United States District Court

Answer

Filed June 14, 1926

Comes now the United States of America, defendant in the above-entitled action, and makes answer to the bill of complaint filed by the plaintiffs herein, as follows:

I

Admits that the plaintiffs enumerated in the preamble of the said bill are market agencies and dealers at the Oklahoma National Stockyards, Oklahoma City, Oklahoma, and are duly registered as such with the Secretary of Agriculture, as in said preamble set forth.

II

Admits the allegations contained in Paragraph I of said bill.

III

Alleges that the matters and things set up in Paragraphs II and III of said bill are either conclusions of law or matters of record in this suit and therefore do not require an answer.

IV

Admits the allegations contained in Paragraph IV of said bill.

V

Admits the allegation in Paragraph V of said bill as to the finding and conclusion of the Secretary of Agriculture against these plaintiffs quoted therein, but denies each and every other allegation in said paragraph.

VI

Admits the allegations in Paragraph VI of said bill with reference to the finding and conclusion of said Secretary of Agriculture against these defendants as quoted therein, but denies each and every other allegation of said paragraph.

42 VII

Admits the allegations in Paragraph VII of said bill with reference to the order of the Secretary of Agriculture against these plaintiffs as quoted therein, but as to the remainder of said paragraph says that the matters and things therein set up are conclusions of law and therefore do not require an answer. The United States nevertheless denied that said order of the Secretary, if unreasonable, arbitrary, or oppressive, or an infringement of plaintiffs' rights.

VIII

Denies that that portion of said order of the Secretary numbered 2 is without testimony in the record of hearings to support it, and denies that said portion of said order is arbitrary, unreasonable, oppressive, illegal, or prejudicial to plaintiffs' rights; as to the

remainder of said paragraph, the United States says that the matters and things therein set up are conclusions of law and therefore do not require an answer.

IX

Says that the matters and things set up in Paragraph IX of said bill are conclusions of law and therefore do not require an answer, but nevertheless denies that the portion of said order of the Secretary numbered 3 is unfair, unjust, vague, arbitrary, oppressive, or indefinite, or that the same is unsupported by evidence.

X

Says that the allegations contained in Paragraph X of said bill are conclusions of law and therefore do not require an answer, but nevertheless denies that the evidence upon which said order of the Secretary was based was incompetent, irrelevant, immaterial, or prejudicial.

XI

Says that the allegations set forth in Paragraph XI of said bill as to the creation of business by the Bollinger & Spencer
43 Live Stock Commission Company and the causes thereof, are irrelevant and immaterial and therefore neither admits or denies them. As to the remaining allegations in said paragraph, the United States says that the same are argumentative conclusions of law and fact and therefore do not require an answer.

XII

Says that the allegations contained in paragraph 12 of said bill are conclusions of law and therefore do not require an answer.

XIII

Says that the allegations set forth in the first and second sections of paragraph XIII of said bill are conclusions of law and therefore do not require an answer; that the allegations set forth in the third section of said paragraph are irrelevant and immaterial and therefore neither admits nor denies them; that the allegations set forth in the fourth section of said paragraph are argumentative conclusions of law and fact and therefore do not require an answer, but nevertheless denies that said order of the Secretary is unreasonable, arbitrary, or oppressive, or denies plaintiff's of any of their rights.

XIV

Denies the allegations contained in paragraph XIV of said bill, alleging, however, that these allegations at the end thereof with reference to the effect of the Secretary's order upon plaintiff's rights are conclusions of law and therefore require no answer.

XV

Says that the allegations set forth in Paragraph VX of said bill are conclusions of law and therefore require no answer.

XVI

Answering Paragraph XVI of said bill, the United States says it is without knowledge as to the actual effect of said order of the Secretary upon the business of the plaintiffs, or as to the details of plaintiff's business relations with their customers as therein
44 set forth, or as to the effect which the enforcement of said order will have upon plaintiffs' business standing and reputation; but it says that the allegations of said paragraph are irrelevant and immaterial to the validity of the Secretary's order and to this action, and therefore need be neither admitted nor denied; as to the remainder of said paragraph, it says that the allegations therein contained are conclusions of law and therefore do not require an answer.

XVII

Says that the allegations contained in Paragraph XVII of said bill are conclusions of law and therefore require no answer.

XVIII

Admits only that Jean Pryor had ceased operations as dealer upon the Oklahoma National Stockyards prior to the filing of said complaint by the Secretary of Agriculture, but denies each and every other allegation in said paragraph; nevertheless alleging that the allegations set forth in the last section of said paragraph are conclusions of law and therefore require no answer.

XIX

Admits the allegations contained in Paragraph XIX of said bill as to the penalties to which plaintiffs will be subjected in case of their failure to observe and obey said order of the Secretary of Agriculture; but denies that compliance with said order will cause irreparable damage and loss to the plaintiffs or to any of them, and denies that its issuance, existence, and continuance in force has caused or will cause irreparable injury and damage to the standing, reputation, business integrity, and business of the plaintiffs or any of them. Answering the last section of said Paragraph XIX, the United States says that the allegations therein contained are conclusions of law and therefore require no answer.

Wherefore defendant prays that plaintiff's bill of complaint in this action be dismissed and that the defendant herein be awarded its costs and disbursements in this action.

WILLIAM J. DONOVAN,
Assistant to the Attorney General.
H. B. TEEGARDEN,
Special Assistant to the Attorney General.

45

(File indorsement omitted.)

46 In United States District Court

Argument and submission

(February 24, 1928)

(Before KENYON, circuit judge, and WILLIAMS and COTTERAL, district judges)

On this 24th day of February, 1928, the complainants appear by Fred E. Suits, Esq., and C. E. Hall, Esq., their attorneys, and the defendant by Roy St. Lewis, Esq., United States attorney, and H. B. Teegarden, Esq., special assistant to the Attorney General of the United States. Thereupon, this cause comes on for final hearing, and the complainants introduce evidence and proof and rest, and thereafter the defendant introduces evidence and proof and rests, and the taking of evidence is closed. Arguments of counsel are heard, and said cause is submitted to the court for determination, with leave to complainants to file abstract of evidence and brief within thirty days, and the defendant is given five days thereafter in which to file reply brief.

47 In United States District Court

[Title omitted.]

Stipulation as to evidence

(Filed October 5, 1928)

It is hereby stipulated and agreed by and between the parties in the above-entitled cause, by their counsel of record, that for purposes of an appeal herein to the Supreme Court of the United States the following shall constitute and be considered a true statement of the evidence material to the determination of the issues upon said appeal:

I. Counsel for the United States conceded at the hearing before the district court that the Bolinger and Spencer Livestock Commission Company had, before the hearing before the Secretary of Agriculture, been dissolved and ceased to transact business on the Oklahoma Stockyards, and counsel stated that the United States would not object to the modification of the Secretary's order as prayed by

the plaintiffs, in so far as it relates to the said Bolinger and Spencer Livestock Commission Company, and in so far as it relates to individual acts of the plaintiffs unmotivated by any concert or agreement among them.

48 II. It is agreed by the parties that the Producers Commission Association is organized under and exists by virtue of an act of the State of Oklahoma entitled "Co-operative agricultural associations," approved March 19, 192', being chapter 181, Session Laws of Oklahoma of 1923. Said act was read into the record at the hearing before the Secretary of Agriculture, and it is agreed that the same shall constitute and be considered a part of this record on appeal. Sections 5637 to 5652, inclusive, being Article XIX of chapter 34, Compiled Oklahoma Statutes of 1921, entitled "Co-operative Corporations," were also read into the record at the Secretary's hearing, and it is agreed that the same shall also constitute and be considered a part of this record upon appeal.

III. It is further agreed as a matter of record that plaintiffs' contention that their alleged boycott of the Producers Commission Association was justified by reason of the limitation in the corporate powers of that association imposed by the law under which it was organized was first raised by plaintiffs' counsel during the hearing before the Secretary of Agriculture and later during the oral argument before the Secretary of Agriculture.

IV. That the record contains no evidence as to whether the live stock which the Producers Commission Association bought or sold or attempted to buy and sell upon the Oklahoma City Stockyards was or was not the live stock of its members.

V. That the record contains no evidence as to whether the limitation in the corporate powers of the Producers Commission

49 Association imposed by the law under which it was organized was or was not the reason motivating the plaintiffs' alleged combination to boycott said association, as referred to in the opinion of the district court.

Dated October 4th, 1928.

H. B. Teegarden,
Special Assistant to the Attorney General.
Hall & Thompson,
Fred E. Suits,
Counsel for Plaintiffs.

[File indorsement omitted.]

50 In United States District Court

Final decree

Filed July 27, 1928

The said cause having been tried at a final hearing upon the pleadings and the evidence and duly argued by counsel for the parties, upon consideration thereof, this court finds and concludes

that the order of the Secretary of Agriculture of date May 18, 1925, against the plaintiffs, described in their bill herein, was not justified, for and upon the ground set forth in our opinion filed this date; and it is therefore by the court

Ordered, adjudged, and decreed that the enforcement of said order against the plaintiffs, and each of them, be, and it is hereby, perpetually enjoined.

To the said decree counsel for the defendant at the time excepted and excepts.

July 27, 1928.

WM. S. KENYON,
Circuit Judge.
R. L. WILLIAMS,
District Judge.
JOHN H. COTTERAL,
Circuit Judge, formerly district judge, and assigned to hold district court, Western District of Oklahoma.

[File indorsement omitted.]

51 In United States District Court

Opinion on final hearing

Filed July 28, 1928

(Before KENYON, circuit judge, and WILLIAMS and COTTERAL, district judges)

COTTERAL, *District Judge:*

The plaintiffs sue as "market agencies" and "dealers" for an injunction against the enforcement of an order of the Secretary of Agriculture, made upon findings, after complaint, notice, and a full hearing, at which evidence was taken under Title III of the packers and stockyards act (42 Stat. 159.) By the order they were required to cease and desist individually and by concerted action from engaging in and using unfair and unjustly discriminatory practices or devices in connection with the buying and selling of live stock, as defined in the act, at the Oklahoma City National Stockyards at Oklahoma City, Oklahoma, by failing and refusing to buy live stock from and sell live stock to the Producers Commission Association and the Bollinger & Spencer Live Stock Commission Company.

It appears that the latter company had, before the departmental hearing, been dissolved and ceased to transact business at those yards, and by concession of counsel for the United States the order, so far as it affects that company, should be enjoined. It is further conceded that the order can not be sustained against the individual acts of the plaintiffs.

The Secretary of Agriculture found that the said stockyard was a public stockyard market as defined in Title II of the act; that cer-

tain of the plaintiffs were "market agencies," registered under the act and engaged in buying and selling live stock, and others of them were "dealers," registered and engaged in buying and selling live stock on their own account, at said yard; that it was essential to maintain there a free, open, and competitive live stock market
52 and any interference therewith depressed the prices of live stock to the prejudice and disadvantage of the sellers thereof and restricted interstate commerce.

The Secretary further found that the plaintiffs were engaged individually and in concert in unfair and unjustly discriminatory practices or devices in the handling, buying, or selling of live stock at said yards, as defined in Title III, section 312, of the act, and while freely buying and selling live stock in commerce at said yards among themselves persistently refrained from and refused handling, buying, or selling live stock there from the Producers Commission Association, a cooperative market agency and duly registered and qualified to transact business, and continue to do so, thereby unjustly and unfairly discriminating against the association until it ceases to do business on or about March 11, 1925, to its prejudice and disadvantage.

We shall briefly express our views upon the grounds of complaint against the order which appear to us to merit consideration.

The first of these we notice in that the packers and stockyards act did not prohibit the plaintiffs, assuming they acted in concert, from dealing with whom they pleased. Counsel rely upon the cases of Hopkins vs. U. S., 171 U. S. 578, and Anderson vs. U. S., Id. 604. No claim is made in the bill or otherwise that the transactions did not occur in interstate commerce. And to show those cases were based on different facts and are inapplicable, it is only necessary to refer to the case of Stafford vs. Wallace, 258 O. S. 495, upholding the validity of the act, where it was said, at page 525:

"Again, if the result of the combination of commission men in the Hopkins case had been to impose exorbitant charges on the passage of the live stock through the stockyards from one State to another, the case would have been different, as the court suggests. The
53 effect on interstate commerce in such a case would have been direct. Similarly, in the Anderson case, if the combination of dealers had been directed to collusion with the commission men to secure sales at unduly low prices to the dealers and to double commissions, or to practice any other fraud or oppression calculated to decrease the price received by the shipper and increase the price to the purchaser in the passage of live stock through the stockyards in interstate commerce, this would have been a direct burden on such commerce and within the antitrust act."

The plaintiffs further claim there is no sufficient legal evidence to support the adverse findings of the Secretary. The transcript of the evidence being voluminous, counsel on both sides assumed at the hearing, for the convenience of the court, to point out in their briefs those portions of it deemed to bear on the subject.

The Secretary was authorized to ascertain the facts as a basis for an appropriate order. When a department has that authority, then by general rule its findings of fact upon the evidence taken at a hearing are conclusive, but questions of law are open to review by the courts. The particular jurisdiction of this court over the action of the Secretary of Agriculture is the same as in case of a suit to enjoin an order of the Interstate Commerce Commission. (Sec. 316, packers & stockyards act; sec. 208, Judicial Code.) His findings are prima facie correct; and the pertinent inquiry with regard to the findings of fact is whether they are based on substantial evidence, which is a question of law. (Int. Com. Comm. vs. Union Pac. R. R., 222 U. S. 541; Virg'ian Ry. vs. U. S. 272 U. S. 658.) Conceding to these parties the right to deal at will separately, their acts done in concert, if they amounted to a boycott against lawful trade in live stock by the Producers Commission Association, would take
54 on the form of a conspiracy, and become a public wrong. Eastern States Lumber Ass'n. v. U. S., 234 U. S. 600. Montague vs. Lowry, 193 U. S. 36. Binderup vs. Pathe Exchange, 263 U. S. 291.

We are satisfied there was substantial evidence to support the findings of the Secretary. The acts of the plaintiffs and the circumstances were amply sufficient to show the plaintiffs had combined to boycott the association and make their object effective by their concerted action. The evidence of the combination or conspiracy was circumstantial. But it was not essential to prove a formal or explicit agreement. It might be inferred from the acts that were done. (Eastern States Lumber Ass'n. vs. U. S., supra.) Also, we find there was sufficient legal evidence to support the findings of the Secretary that was not open to the technical objections of the plaintiffs; and the criticisms made upon the credibility of the witnesses and the force of their testimony can be regarded only as raising questions of fact, which are foreclosed by the findings of the Secretary.

But the plaintiffs complain of the order in this case on the ground that the association was not authorized within its corporate powers to buy and sell the livestock at this yard, and hence they were not obligated to deal with or recognize it or subject to this coercive order, respecting the transactions in question. We think their position is well taken and that it must be immaterial on what ground they seek to justify their conduct, so long as they were within their rights.

We may conceive of a cooperative association transacting the business of buying and selling livestock for the mutual interest of its stockholders or members, and as such entitled to register with the Secretary as a "market agency" or "dealer." But we must look
55 to the powers of this association under the Oklahoma State law to determine whether it might engage in such business and thereby be entitled to the benefit of the act of Congress.

It appears that the association was organized under chapter 181, Oklahoma Session Laws, 1923, where its charter powers are defined. It is there provided that any number of persons not less than five,

engaged in the production of agricultural or horticultural products, may act together and organize a cooperative association, not having capital stock and not conducted for profit, for mutual help, in collectively possessing, handling, shipping, and marketing such products of persons so engaged, etc. Various other provisions are added to facilitate the object specified, such as the buying of machinery and supplies, acquiring and disposing of the property of the members, contracting and acting with other cooperative associations, enjoying incidental powers. There are other details, but they need not be enumerated, exception section 11, which reads:

"No association organized hereunder shall handle the agricultural or horticultural product of any nonmember except for storage."

The general rule is that a corporation has only such powers as are conferred by law and other necessarily incident to the proper exercise of its express powers. (Myatt vs. Ponca Land & Loan Co., 14 Okl. 189; 14-A C. J. 252.) All other powers are excluded. (14-A C. J. 269.) It is clear that this association was authorized only to buy and sell livestock of its members. Any other transactions were outside of its express and incidental powers. No testimony has been pointed out as to the transactions of the association, except that its manager and salesman bought and sold livestock at the yard, and none that they sold livestock of the members of the association. It was incumbent on the Government to show its right to engage in these transactions.

56 Where the State legislature has seen fit to thus limit the powers of an organization, the buying or selling of live stock of others by it at the stockyards were acts that were ultra vires, or, more accurately stated, wholly illegal in character. It is to be said that even if the plaintiffs had contracted with this association, and the contracts were executory, they could not be enforced. (2 R. C. L. p. 675; 1 Clark & Marshall, Priv. Corporations, sec. 213.) The plaintiffs therefore not only had no duty to recognize the agents of the association, but it was their absolute right to refrain from dealing with them. The packers and stockyards act does not confer corporate rights or powers upon any corporation, but grants to persons only the privileges and protection there specified, assuming they have the right to engage in the transactions. Its protection is extended to an incorporated company only when acting within the powers derived from its charter, and certainly not if it seeks to engage in dealings forbidden by State law.

The answer to this is that both by the principles of the common law and a State statute declaratory thereof, found in section 5293, Comp. St. 1921, this defense is not available to the plaintiffs. That section is as follows:

"The due incorporation of any company claiming in good faith to be a corporation under this chapter, and doing business as such, or its right to exercise corporate powers, shall not be inquired into collaterally in any private suit to which such de facto corporation

may be a party; but such inquiry may be had and action brought at the suit of the State, in the manner prescribed in civil procedure."

We do not find any such principles that are applicable or that the statute applies to this case. The question does not arise in any suit between those parties. It is not a case where property has
57 been acquired in excess of corporate powers or where the parties have so dealt with each other that one of them is disabled to plead a want of corporate power to act. Instead it is one where the dealing with a corporation has been declined by the plaintiffs. For this reason it is our opinion that the plaintiffs were free to refuse to deal with the association. (See Central Transportation Co. vs. Pullman, 139 U. S. 24; 1 Clark & Marshall, Priv. Corporations, sec. 213. Hummel vs. Warren Steel Casting Co., 4 Fed. (2) 451.)

Not doubting in the least that competitive trading and cooperative marketing are valuable to industry and agriculture, as contended by the able counsel for the Government, our conclusion is that the advantages of the packers and stockyards act were not extended to the Producers Commission Association for the purpose of buying or selling live stock of others, and that the order of the Secretary of Agriculture as to it should not have been made for that reason as a matter of law, and being concededly invalid as to the Bollinger and Spencer Livestock Commission Company, and no other relief being deemed adequate, the enforcement of the order should be enjoined by this court. It will be so decreed in this case.

58 In United States District Court

Concurring opinion

Filed July 28, 1928

WILLIAMS, *District Judge*, concurring:

Section 2, chapter 181, page 309, Session Laws, 1923, amending act of June 14, 1917 (see chap. 34, art. 16, Okla. Compiled Statutes 1921, and Session Laws 1917, sec. 11), under which the Producers Commission Association is organized, relates to cooperative agricultural and horticultural associations organized without any capital stock and not to be conducted for profit. The legislature of 1919 provided for cooperative corporations, with limitations as to capital stock and voting powers of stockholders, to engage in an agricultural, dairy, live stock, irrigation, horticultural, mercantile, manufacturing, mechanical, or industrial business, same to be operated on a cooperative plan (see Session Laws 1919, page 211; Oklahoma Compiled Laws 1921, chapter 34, article 19) and are permitted to deal with and for nonmembers. (See paragraph 3, sec. 5648 Okla. Comp. Laws 1921.) As I construe the opinion prepared by Judge Cotteral had the Producers Commission Association been organized under

the act of 1919 the plaintiff would not be entitled to the injunctive relief which is herein awarded, and I, therefore, concur in his opinion.

59 In United States District Court

Concurring opinion

Filed July 28, 1928

KENYON, *Circuit Judge*, concurring:

I concur in the opinion of Judge Cotteral, as it seems clear that the Producers Commission Association, by virtue of its incorporation under Chap. 181, Okl. Session Laws of 1923, secured authority only to buy and sell the live stock of its members. I am in agreement with the suggestion of Judge Williams in his concurring opinion that had the Producers Association been incorporated under the act of 1919, referred to by him, plaintiff would not be entitled to the relief we are granting.

[File indorsement omitted.]

60 In United States District Court

Petition for appeal

Filed September 24, 1928

Conceiving themselves aggrieved by the final decree and judgment of the United States District Court for the Western District of Oklahoma, made and entered in the above-entitled cause July 28, 1928, the defendants therein hereby appeal from said judgment to the Supreme Court of the United States, and pray that said appeal may be allowed.

In United States District Court

Assignment of errors

Filed September 24, 1928

And the said defendants assign the following errors in the record of proceedings in this case:

1. The court erred in enjoining the enforcement of the order of the Secretary of Agriculture of May 18, 1925, against the plaintiffs herein.

2. The court erred in refusing to dismiss said plaintiffs' bill of complaint as prayed in the defendants' answer.

3. The court erred in enjoining the enforcement of the order of the Secretary of Agriculture of May 18, 1925, against the said plaintiffs, in so far as it concerned their dealings or their refusals to deal with the Producers Commission Association, by agreement or understanding among them.

4. The court erred in holding that the Producers Commission Association was not authorized within its corporate powers to buy and sell live stock upon the Oklahoma National Stockyards at Oklahoma City, Oklahoma.

5. The court erred in holding that, because the Producers Commission Association was not authorized within its corporate powers to buy and sell the live stock of non-members, that it was lawful for these plaintiffs, acting by concert or in agreement, to refuse to deal with said association.

61 6. The court erred in refusing to hold that, for the purpose of determining the validity of the Secretary's order of May 18, 1925, the Producers Commission Association, in buying and selling live stock upon the stockyards at Oklahoma City, Oklahoma, was and is presumed, in the absence of proper showing to the contrary, to be within the proper exercise of its corporate powers.

7. The court erred in holding that the Producers Commission Association, in buying and selling live stock upon the stockyards at Oklahoma City, Oklahoma, or in offering to do so from time to time, as such transactions are shown in the record of proceedings before the Secretary of Agriculture, was acting in excess of its proper corporate powers.

8. The court erred in holding that because the Producers Commission Association was limited by its corporate powers to buying and selling the live stock of its members, it was not entitled to the protection of the packers and stockyards act, 1921, against the unlawful acts of these plaintiffs in refusing and refraining by agreement and concert of action to deal with said association.

9. The court erred in holding that because the advantages of the packers and stockyards act, 1921, were not extended to the Producers Commission Association for the purpose of buying and selling the live stock of non-members, that the order of the Secretary of Agriculture against the plaintiffs herein should not have been made as to said association as a matter of law.

10. The court erred in holding that the plaintiffs were entitled to justify their agreement to boycott the Producers Commission Association on the ground that some or all of the dealing with such association refused by them were in excess of the corporate power of the association; and in refusing to hold that the planitiffs were not entitled so to justify such boycott.

11. The court erred in refusing to hold that the transactions
62 or proposed transactions in which plaintiff refused to deal, and urged others not to deal, with the Producers Commission Association, as shown by the record of proceedings before the Secretary

of Agriculture, were not shown upon such record to be in excess of the proper corporate powers of such association.

12. The court erred in refusing to hold that the acts of the plaintiffs referred to in Assignment No. 11, above, were not shown upon the record to have been actuated in any measure by the belief that the transactions there in question were in excess of the proper corporate powers of the Producers Commission Association.

Prayer for reversal

For which errors the defendants herein pray that the said judgment and decree of the district court, dated July 28, 1928, in the above-entitled cause be reversed and judgment rendered in favor of said defendants.

WILLIAM J. DONOVAN,
The Assistant to the Attorney General.
H. B. TEEGARDEN,
Special Assistant to the Attorney General.

ROY ST. LEWIS,
United States Attorney.

In United States District Court

Order allowing appeal

Filed September 24, 1928

Appeal allowed as prayed, and issuance of citation ordered, returnable within thirty days from the date hereof. Dated September 24th, 1928.

F. E. KENNAMER,
Judge.

[File indorsement omitted.]

63 In United States District Court

[Title omitted.]

Stipulation re transcript of record

Filed October 5, 1928

For purposes of an appeal which has been allowed herein to the Supreme Court of the United States, the clerk is requested to prepare and forward to the clerk of said court a transcript of record on appeal; and it is hereby stipulated and agreed by and between the parties to this cause, by their counsel of record, that said record on appeal shall include the following proceedings:

1. Bill in equity, filed April 14, 1926.
2. Answer by the United States, filed June 14, 1926.

3. Trial and argument, February 24, 1928.
4. Stipulation of evidence, filed October 5th, 1928.
5. Opinion on final hearing, filed July 28, 1928.
6. Final decree, entered July 28, 1928.
7. Petition for appeal, assignment of errors, and order of allowance.
8. Citation on appeal.
9. This designation of record.

H. B. TEEGARDEN,
Special Assistant to the Attorney General.
HALL & THOMPSON,
FRED E. SUITS,
Counsel for Plaintiffs.

[File indorsement omitted.]

In Supreme Court of the United States

Statement of points to be relied upon and designation to print entire record

Filed November 5, 1928

In support of its contention that the district court erred in the particulars pointed out in the assignments of error hereinbefore filed, appellant intends to rely upon the following points:

1. The appellees were not justified, by any limitation in the corporate powers of the Producers Commission Association, in combining to boycott said association by refusing to deal with it.

2. The appellees were not in any case justified, by any limitation in the corporate powers of the Producers Commission Association, in combining to boycott said association with respect to dealings and transactions not in excess of its corporate powers.

The appellant represents that the entire record as filed will be necessary for the consideration of these points.

WILLIAM D. MITCHELL,
Solicitor General.
WILLIAM J. DONOVAN,
The Assistant to the Attorney General.
H. B. TEEGARDEN,
Special Assistant to the Attorney General.

[File indorsement omitted.]

64 [Clerk's certificate to foregoing transcript omitted in printing.]

[Indorsement on cover:] File No. 33822. W. Oklahoma D. C. U. S. Term No. 513. The United States of America, appellant, vs. American Livestock Commission Company; Lewis Barefoot, trading and doing business as the Barefoot Commission Company; Cassidy Southwestern Commission Company et al., etc., et al. Filed October 24, 1928. File No. 33822.

In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 513

UNITED STATES OF AMERICA, APPELLANT

v.

AMERICAN LIVESTOCK COMMISSION COMPANY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA

STATEMENT OF JURISDICTION

The appellant submits herewith, in compliance with Rule 12, its statement of the basis of this Court's jurisdiction to review on appeal the judgment of the District Court.

A

STATUTORY PROVISIONS

This appeal was prosecuted direct from the District Court under the following statutory provisions:

1. Section 238 (5) of the Judicial Code, Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (U. S.

C., Title 28, sec. 345 (5)). This confirms the right of direct review by this Court of a final decree of a District Court where so provided in section 316, Packers and Stockyards Act, 1921.

2. Section 316, Packers and Stockyards Act of August 15, 1921, c. 64, 42 Stat. 159, 168 (U. S. C., Title 7, sec. 217). This Act makes applicable to the enforcement of the Secretary's orders under that Act, all laws relating to restraining the enforcement of orders of the Interstate Commerce Commission.

3. The District Court Jurisdiction Act of October 22, 1913, c. 32, 38 Stat. 208, 219; see U. S. C. Title 28, sec. 41 (28), 43–48; also U. S. C. Sup. I, Title 28, sec. 47a. This Act confers upon District Courts jurisdiction of suits to enjoin orders of the Interstate Commerce Commission, and provides that appeals from final decrees in such suits may be taken direct to this Court within sixty days after their entry.

B

DATES OF JUDGMENT AND APPLICATION FOR APPEAL

The decree of the District Court enjoining the enforcement of the order of the Secretary of Agriculture was entered July 28, 1928. (R. 50.)[1] The application for the appeal was presented and the appeal allowed on September 24, 1928. (R. 60–62.)

[1] Record references are to the original transcript, which is not yet printed.

C

NATURE OF THE CASE

This suit was brought to enjoin enforcement of an order of the Secretary of Agriculture issued under Title III of the Packers and Stockyards Act, 1921, *supra*, directed against a boycott on the public stockyards at Oklahoma City, Oklahoma. (R. 32–40.) By its final decree the District Court below permanently enjoined the enforcement of the Secretary's order. (R. 50.)

D

CASES SUSTAINING JURISDICTION

Stafford v. *Wallace*, 258 U. S. 495.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

WILLIAM J. DONOVAN,
The Assistant to the Attorney General.

H. B. TEEGARDEN,
Special Assistant to the Attorney General.

NOVEMBER, 1928.

In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 513

UNITED STATES OF AMERICA, APPELLANT

v.

AMERICAN LIVESTOCK COMMISSION COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA

MOTION TO ADVANCE

Come now the United States, by its Solicitor General, and moves the Court to advance the above-entitled cause for a hearing on a day convenient to the Court.

STATEMENT

The appellees are market agencies and dealers on the public stockyards at Oklahoma City, Oklahoma, and registered as such with the Secretary of Agriculture under the Packers and Stockyards Act, 1921, Sec. 303, c. 64, 42 Stat. 159, 163, U. S. C. Title 7, Sec. 203. They brought this suit to enjoin the enforcement of an order of the Secretary of Agriculture which directed them to discontinue a boy-

cott against a cooperative marketing association. On July 28, 1928, the court rendered its decision and decree (R. 50–59), permanently enjoining the enforcement of the Secretary's order.

The question presented is whether market agencies and dealers upon a public stockyard market may, under the Packers and Stockyards Act, 1921, agree with each other to refuse to deal with a cooperative marketing concern on such stockyards, and justify such refusal by the fact that the cooperative concern is limited by its corporate powers in the nature of the transactions in which it may engage, and that those transactions are not shown affirmatively upon the record to be exclusively within such limitation.

REASON FOR ADVANCING

The early and final determination of this question is of importance to the Department of Justice and to the Secretary of Agriculture in their administration of the Packers and Stockyards Act throughout the United States.

Expedition is also provided by law. Section 47a, Title 28, U. S. C. Sup. I, which is made applicable to this case by Section 217, Title 7, U. S. C., provides—

> Appeals to the Supreme Court under this Section and Section 47 of this Title shall have priority in hearing and determination over all other causes, except criminal causes in that Court.

Notice of this motion has been served upon counsel for the appellees.

WILLIAM D. MITCHELL,
Solicitor General.
WILLIAM J. DONOVAN,
The Assistant to the Attorney General.
H. B. TEEGARDEN,
Special Assistant to the Attorney General.
NOVEMBER, 1928.

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CITATIONS

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Farmers' Loan & Trust Co. v. *Carbo*, 7 N. Y. 436 (20)

Matthew v. *Pennsylvania Railroad Co.*, 9 Fed. 65 (21)

Miner & Hamlin Supply Co. v. *Stockgrowers' Bank*, 172 Fed. 630 (20)

Missouri Ditch Co. v. *Zollerbank*, 97 Cal. 543 (22)

Railroad Co. v. *Ellerman*, 105 U. S. 166 (21)

American Digest, Cent. Ed., Vol. 32, columns 1630-1637 (20)

Statutes:

Perkins and Hinkyards Act of 1921, Title III, c. 64, 42 Stat. 120—

Sec. 301 (c), (d); U. S. C. Title 7, Sec. 241 9

Sec. 304; id. Sec. 245 9

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Sec. 307; id. Sec. 248 4

Sec. 312 (a), (b); id. Sec. 253 4-5

Sec. 314 (a); id. Sec. 255 5

Sec. 316; id. Sec. 257 5

Compiled Oklahoma Statutes, 1921, Sec. 3260 (Art. I, c. 24), 8, 21

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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 513

UNITED STATES OF AMERICA, APPELLANT

v.

AMERICAN LIVESTOCK COMMISSION COMPANY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 28) is reported in 28 F. (2d) 63.

QUESTION PRESENTED

The Producers Commission Association is a co-operative marketing corporation, operating on the Oklahoma City stockyards. In proceedings under the Packers and Stockyards Act, the Secretary of Agriculture found that the appellees, operating as market agencies in these yards, had combined to boycott the Producers Commission Association by declining to purchase from or sell to it livestock, and

ordered them to desist from this discriminatory practice. It appeared that under its articles of incorporation the Producers Commission Association had no corporate power to handle livestock not produced by its members. When charged with discriminatory practice, the appellees contended that the Producers Commission Association was exceeding its corporation power by handling cattle of nonmembers.

The questions presented by this appeal are whether, either in the proceedings before the Secretary of Agriculture or in this suit in the District Court, brought by the appellees to enjoin the enforcement of the Secretary's order, the burden was on the Government to prove that the livestock sold or offered for sale by the Producers Commission Association was the product of its members, or was upon the appellees to show the contrary, when attempting to justify or excuse their boycott on the ground that the Producers Commission Association was acting *ultra vires*.

A further question in the case is whether the Producers Commission Association became an outlaw and not entitled to the protection afforded by the Packers and Stockyards Act against unjust discrimination as to its lawful business, conducted within the limits of its corporate authority, in selling and handling cattle received by it from its members, because in some respects it may have exceeded its corporate authority by purchasing, or attempting to purchase, nonmembers' livestock.

STATUTES INVOLVED

Title III of the Packers and Stockyards Act, 1921, c. 64, 42 Stat. 159 (U. S. c. Title 7, Secs. 201, 205, 207, 208, 213, 215, 217) defines market agencies and sets forth their obligations and duties as follows:

> SEC. 301. When used in this Act—
>
> * * * * *
>
> (c) The term "market agency" means any person engaged in the business of (1) buying or selling in commerce livestock at a stockyard on a commission basis or (2) furnishing stockyard services; and
>
> (d) The term "dealer" means any person, not a market agency, engaged in the business of buying or selling in commerce livestock at a stockyard, either on his own account or as the employee or agent of the vendor or purchaser.
>
> SEC. 304. It shall be the duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyard.
>
> SEC. 306 (f). After the expiration of the sixty days referred to in subdivision (a) no person shall carry on the business of a stockyard owner or market agency unless the rates and charges for the stockyard services furnished at the stockyard have been filed and published in accordance with this section and the orders of the Secretary made thereunder; nor charge, demand,

or collect a greater or less or different compensation for such services than the rates and charges specified in the schedules filed and in effect at the time; nor refund or remit in any manner any portion of the rates or charges so specified (but this shall not prohibit a cooperative association of producers from bona fide returning to its members, on a patronage basis, its excess earnings on their livestock, subject to such regulations as the Secretary may prescribe); nor extend to any person at such stockyard any stockyard services except such as are specified in such schedules.

SEC. 307. It shall be the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful.

SEC. 312 (a). It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with the receiving, marketing, buying or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing or handling, in commerce at a stockyard, of live stock.

Contended by Rep - contends not broad enough reach Packers to deal with them

(b) Whenever complaint is made to the Secretary by any person, or whenever the Secretary has reason to believe, that any stockyard owner, market agency, or dealer is violating the provisions of subdivision (a), the Secretary after notice and full hearing may make an order that he shall cease and desist from continuing such violation to the extent that the Secretary finds that it does or will exist.

SEC. 314 (a). Any stockyard owner, market agency, or dealer who knowingly fails to obey any order made under the provisions of sections 310, 311, or 312 shall forfeit to the United States the sum of $500 for each offense.

SEC. 316. For the purposes of this title, the provisions of all laws relating to the suspending or restraining the enforcement, operation, or execution of, or the setting aside in whole or in part the orders of the Interstate Commerce Commission, are made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the provisions of this title, and to any person subject to the provisions of this title.

An Act of the State of Oklahoma of March 19, 1923 (c. 181, Session Laws of Oklahoma, 1923), amending Sections 5598 to 5621 (Art. XVI of Chap. 34), Compiled Oklahoma Statutes, 1921, is stipulated as a part of the record (R. 27).

Relevant portions of the Compiled Statutes, as so amended, are as follows:

SEC. 5599. Any number of persons, not less than five, engaged in the production of agricultural or horticultural products, may act together and organize cooperative associations, not having capital stock and not conducted for profit, for mutual help in collectively processing, preparing for market, picking, storing, shipping, handling, and marketing such products of persons so engaged; and the manufacturing or the making of the by-products thereof; or in the financing of any of the above activities; and may have marketing agencies in common with other like or similar associations; and such associations and their members may make all necessary contracts and agreements to effect such purposes; and such association may make advances to members, and such members may hire, rent, or buy their farm supplies and machinery from or through the association; Provided, that such association shall be operated for the mutual benefit of the members thereof, only as such producers; and no member of the association shall have more than one vote because of the membership capital he may own therein; and such associations shall not pay dividends on membership capital in excess of eight per centum per annum. And cooperative associations, not having capital stock, now existing in Oklahoma, exercising, or attempting to exercise, corporate rights and powers, or to perform duties as a cor-

poration, for the purpose or any of the purposes aforesaid, are hereby validated, and are granted all of the rights and powers, and subjected to all of the restrictions and limitations, of this Act, as herein amended; and are granted for the enforcement of existing as well as subsequent contracts, all of the rights and remedies herein provided.

SEC. 5600. An Association, in processing, preparing for market, handling and marketing such products of persons so engaged which shall include any by-products thereof as well, may, in addition to all other powers given by this Act, and to effect the purposes of this Act, pledge, hypothecate, mortgage, market or sell any such products as effectively as may be done by the member or members owning same, or such association may acquire title thereto and pledge, hypothecate, mortgage, market and sell the same.

SEC. 5603. * * * the Association shall have power within the limitations of this Act:

* * * * *

(e) To purchase, lease or receive by gift, bequest, or devise and to hold personal and real property necessary in the conduct of its operations and to dispose of same; and to process, prepare for market, handle, pledge, hypothecate, mortgage, market or sell any and all such products mentioned in Sections 2 and 3 of this Act, or to acquire title thereto and to process, manufacture, can, pick, store,

ship, prepare for market, handle, pledge, hypothecate, mortgage, market or sell the same and the action of the Association in pledging, hypothecating, mortgaging, encumbering, marketing, or selling any such products, shall be conclusive on any and all members of the Association.

SEC. 5608. No Association organized hereunder shall handle the agricultural or horticultural product of any nonmember except for storage.

Section 5293 (Article I of Chap. 34), Compiled Oklahoma Statutes, 1921, provides as follows:

> The due incorporation of any company, claiming in good faith to be a corporation under this chapter, and doing business as such, or its right to exercise corporate powers, shall not be inquired into collaterally, in any private suit to which such de facto corporation may be a party; but such inquiry may be had, and action brought, at the suit of the State, in the manner prescribed in civil procedure.

STATEMENT

This suit was brought by the appellees under Section 316 of the Packers and Stockyards Act, to restrain the enforcement of an order of the Secretary of Agriculture directed against certain marketing agencies and dealers on the Oklahoma City stockyards, requiring them to discontinue a boycott against the Producers Commission Association, a marketing corporation operating on that yard.

The proceeding before the Secretary of Agriculture was initiated May 18, 1925, by a complaint and notice of hearing. (R. 12–15.) The appellees (R. 15) answered, testimony was taken before an examiner, and oral argument presented to the Secretary, whereupon he issued his findings of fact, conclusions and order of March 31, 1926 (R. 16), in which the complaint was dismissed as to certain respondents, and the others were ordered to—

> cease and desist from engaging in and using any unfair or unjustly discriminatory practices or devices in connection with the buying and selling of livestock in commerce as defined in said packers and stockyards act at the Oklahoma National Stock Yards, to the prejudice and disadvantage of the Producers Commission Association and of the Bollinger & Spencer Live Stock Commission Company, at the Oklahoma National Stock Yards at Oklahoma City, Oklahoma, in violation of Title III of said act (1) by failing or refusing to buy livestock from or sell livestock to said Producers Commission Association and the Bollinger & Spencer Live Stock Commission Company in the ordinary course of business or to enter into any business relations with them with respect thereto, while at the same time engaging in and carrying on business freely among themselves; (2) by combining or agreeing among themselves to refrain from buying livestock from or selling livestock to the Producers Commission

Association and the Bollinger & Spencer Live Stock Commission Association; and (3) in any other manner shown by the record. (R. 21.)

Thereupon these appellees brought this suit to restrain the enforcement of the order, claiming (1) that the Secretary's findings were not supported by competent evidence, (2) that the alleged boycott was not in violation of law, and (3) that the boycott, if it existed, was justified as to the Producers Commission Association, because the latter was exceeding its corporate powers by handling livestock of others than its members.

At the hearing in the District Court the record of the testimony and proceedings before the Secretary was the only evidence introduced. Counsel for the United States, while not conceding the invalidity of the Secretary's order in any respect, consented to its modification as to Jean Pryor and Claude Allen, and as to dealings with the Bollinger & Spencer Livestock Commission Company, since these parties had gone out of business for reasons not related to the boycott, and as to them the order had no practical operation. (R. 26.) Modification was similarly consented to in so far as the order might be construed to prohibit individual acts or conduct of the plaintiffs unrelated to any concert or agreement among them. (R. 27.)

The question submitted to the court below thus concerns only the validity of the order in so far as it forbade agreements among the remaining plain-

tiffs to refuse dealings with the Producers Commission Association.

The District Court held that there was substantial evidence to support the findings of the Secretary of Agriculture that the stockyard was a public stockyard as defined in Title II of the Act, that certain of the plaintiffs against whom the Secretary's order was directed were market agencies or dealers, and it further held that there was evidence to support the finding of the Secretary that the plaintiffs were engaged in concert in unfair and unjustly discriminatory practices in violation of the Act, by persistently refraining from and refusing to handle, buy or sell "livestock there from the Producers Commission Association, a cooperative market agency." (R. 29.) It stated (R. 30):

> We are satisfied that there was substantial evidence to support the findings of the Secretary. The acts of the plaintiffs and the circumstances were amply sufficient to show the plaintiffs had combined to boycott the association and make their object effective by their concerted action.

The District Court nevertheless enjoined the enforcement of the Secretary's order, on the ground that the Producers Commission Association was acting beyond its corporate powers in handling livestock the product of nonmembers.

In preparing the record for this appeal only the findings of the Secretary were made part of the record and the evidence before him was omitted

by stipulation because not material to the consideration of the only question presented by the appeal. (R. 26.) The stipulation states (R. 27):

> That the record contains no evidence as to whether the livestock which the Producers Commission Association bought or sold or attempted to buy and sell upon the Oklahoma City Stockyards was or was not the livestock of its members.
>
> That the record contains no evidence as to whether the limitation in the corporate powers of the Producers Commission Association imposed by the law under which it was organized was or was not the reason motivating the plaintiffs' alleged combination to boycott said association, as referred to in the opinion of the district court.

There being no evidence as to whether the livestock dealt in by the Producers Commission Association came from its members, the District Court held (R. 31):

> No testimony has been pointed out as to the transactions of the association, except that its manager and salesman bought and sold livestock at the yard, and none that they sold livestock of the members of the association. It was incumbent on the Government to show its right to engage in these transactions.

Proceeding on the assumption that the burden of proof, both before the Secretary and in the District Court was upon the Government to show affirma-

tively that the livestock handled by the Producers Commission Association came from its members and that its acts were therefore not *ultra vires*, the District Court assumed that *all* of its transactions were *ultra vires* and that it was not entitled to the protection of the Packers and Stockyards Acts for the conduct of *ultra vires* transactions, and it thereupon enjoined the enforcement of the order in its entirety. There is no direct finding by the Secretary of Agriculture and no direct statement in this record that the Producers Commission Association made purchases of livestock on the stockyards from other commission houses and market agencies, but the inference to be derived from the Secretary's order and Paragraph IV of the stipulation (R. 27) is that the Association not only sold livestock on the stockyards, but purchased or attempted to make purchases of livestock from other market agencies or commission houses, and we concede that to be the fact. Whether such purchases were to fill orders from members who wanted livestock to stock their farms is not disclosed.

SPECIFICATION OF ASSIGNED ERRORS TO BE URGED

These points covered by the assignments of error (R. 33) and which we desire to press in this Court may be summarized as follows:

I. The District Court erred in holding that either in the hearing before the Secretary or in the District Court the burden was upon the Government to negative the allegation that the Pro-

Stores Commission Association was acting ultra vires and in holding that the burden was upon the Government to establish affirmatively that the livestock sold and offered for sale by the Producers Commission Association on these stockyards came from members.

II. The court below erred in assuming, in the absence of evidence, that all or any substantial part of the livestock sold or offered for sale by the Producers Commission Association came from nonmembers.

III. The court below erred in holding, in effect, that if the Producers Commission Association exceeded its corporate powers by purchasing livestock from other commission houses it became an outlaw and was not entitled to any protection under the Stockyards Act with respect to its authorized business in selling and handling and marketing livestock received from its members.

IV. The District Court erred in enjoining the enforcement of the order of the Secretary of Agriculture in its entirety and in failing to leave the order in operation in so far as it ordered these appellees to desist from their boycotting of the Producers Commission Association's authorized corporate business of handling, selling, and marketing of livestock received by it from its members.

SUMMARY OF ARGUMENT

There is nothing in this record to support that the boycott of the Producers Commission Association

resulted because that Association was exceeding its corporate powers. For all that appears in the record the defense of the boycott for that reason was an afterthought, originated at the hearing before the Secretary. There may be ground for a contention by the appellant that appellees were not in a position to raise the question of *ultra vires* to excuse the boycott or the discriminatory treatment, but we have no reason to insist that transactions of the Producers Commission Association outside of its corporate power should receive the protection of the provisions of the Packers and Stockyards Act.

The state of the record may require the concession by the United States that, in so far as the Producers Commission Association was engaged in purchasing livestock on the stockyards from other commission houses it was operating in excess of its powers defined in its charter. Whether that is so, depends on the meaning of the word "supplies" in the Oklahoma Statute, Section 5509.

There was no evidence presented at any stage of the proceedings that the livestock which the Association sold or offered for sale on the stockyards was not received from members. It is elementary that the burden of showing that a corporation's transactions are *ultra vires* rests on those asserting it as a defense or as a basis for action. It is elementary that the presumption is always that a corporation acts within the limits of its corporate powers. The decision of the District Court that

the burden rested upon the Government to show affirmatively that the Producers Commission Association was not exceeding its corporate authority by selling livestock received from nonmembers, is without any authority to support it.

The order of the Secretary in so far as it may be construed to forbid a boycott of the Producers Commission Association, in respect of the latter's purchases of livestock from nonmembers, may go too far, but the order is valid in so far as it forbids the boycott of the Producers Commission Association's transactions in handling and marketing livestock received from members. The order of the District Court should have been limited to relieving these appellees from the operation of the order in respect only of *ultra vires* purchases of livestock from nonmembers, and the judgment below is erroneous in so far as it allows a boycott of the Producers Commission Association in the sale by it of livestock in the stockyards.

ARGUMENT

The questions presented by this appeal are within a narrow compass. The Producers Commission Association had corporate power to market the livestock products of its members for the account of members or to "acquire title" to the livestock produced by its members and market and sell the same. (See Section 5600, Compiled Statutes of Oklahoma, above quoted.) It was prohibited from handling the products of nonmembers except for storage.

It was a market agency within the meaning of Section 301(c) of Title III of the Packers and Stockyards Act when engaged in the business of selling livestock at the stockyard on a commission basis. That section does not require that to be a market agency a person must both buy and sell.

It was a dealer within the meaning of Section 301(d) of the Act when engaged in selling at the stockyards livestock the title to which it had acquired from its members. That a cooperative association may operate in marketing its members' products on a stockyard regulated by the Act and is entitled to the protection of the statute against discriminatory practices is expressly recognized by Section 306(f), which, in regulating charges of market agencies operating in stockyards, says that the restrictions of the Act—

> shall not prohibit a cooperative association of producers from bona fide returning to its members, on a patronage basis, its excess earnings on their livestock.

Section 312 (a), forbidding discriminatory practices by market agencies and dealers, operates for the protection of other agencies and dealers.

The appellees were found guilty of conspiring to boycott *all* transactions of the Producers Commission Association. That finding, sustained by the decision below, as supported by substantial evidence, must be accepted here. That the Producers Commission Association, if engaged in marketing livestock within the limits of its corporate

authority, was entitled to the protection of the Act and to relief against the boycott is also concluded by the decision below.

The question for consideration on this appeal is the extent to which the Association was committing *ultra vires* acts and the extent to which any *ultra vires* acts deprived it of the protection to its legitimate business afforded by the Packers and Stockyards Act. The record states that no evidence was offered either before the Secretary of Agriculture or in the District Court—

> as to whether the livestock which the Producers Commission Association bought or sold or attempted to buy and sell upon the Oklahoma City Stockyards was or was not the livestock of its members. (Stipulation, Par. IV, R. 27.)

There is nothing in this record and there was nothing, as the stipulation shows, in the record before the trial court to show that the Producers Commission Association was exceeding its corporate power by handling livestock of nonmembers except the fact that it was purchasing or offering to purchase livestock on the stockyards from other market agencies. The fair inference from this fact was that in these purchases the Association was exceeding its corporate authority. Although it had power to purchase the products of its members and acquire title thereto under its articles of incorporation, we are not prepared to assert that such provision in its charter was intended to authorize it to

purchase livestock in the open market from other commission houses and market agencies who were marketing livestock which happened to be the property of members of the Producers Commission Association. The clause in its charter authorizing it to acquire title of members' livestock should, we assume, be construed to authorize only direct purchases from its members, with a view to aiding its members in marketing their products. To this extent the record justifies the conclusion that *ultra vires* acts were being committed.

There is a clause in Section 5599, Oklahoma Statutes (p. 6, supra), that members of an association like the Producers may buy their "farm supplies and machinery" through the association. If livestock for stocking members' farms is covered by the word "supplies," this association was authorized to *buy* livestock to fill orders from members, and in that event none of its acts is shown to be *ultra vires* and our concession would be unjustified and should be disregarded.

There is nothing in the record to justify the conclusion that the livestock marketed and sold by the Producers Commission Association on the stockyards came from nonmembers or, in any event, that all of it had such an origin. It is absurd to assume that a cooperative marketing association, organized for the very purpose of aiding its members to market their products, confines its business to products of nonmembers. The trial court said (R. 31):

> It was incumbent on the Government to show its [Producers Commission Association] right to engage in these transactions.

No authority was cited to support that holding and none can be found. It is elementary that a general presumption of right acting attends a corporation, the effect of which is to place the burden of proof that an act done or contract made was *ultra vires* upon him who alleges that fact as the foundation of his action or defense.

> *Farmers' Loan and Trust Co.* v. *Curtis*, 7 N. Y. 466.
>
> *Chautauque County Bank* v. *Risley*, 19 N. Y. 369.
>
> *Mine and Smelter Supply Co.* v. *Stockgrowers' Bank*, 173 Fed. 859.

A vast array of authority to the same effect is found in American Digest, Century Edition, Vol. 12, Columns 1626-1627. This proposition is not open to debate. It follows that on this record the case must be dealt with as if all of the livestock sold and offered for sale by the Producers Commission Association came from members.

The only remaining question is whether the fact that the Association may have exceeded its corporate power in purchasing livestock on the yards made it an outlaw so as to deprive it of all protection for its legitimate business, and to excuse the boycott in so far as it related to its authorized corporate transactions. We know of no basis for such a contention, and none is offered in the decision below.

It is not clear under the authorities that these appellees were in any position to raise the claim of *ultra vires* or offer it as an excuse for the boycott (see *Railroad Company* v. *Ellerman*, 105 U. S. 166; *Matthew* v. *Pennsylvania R. R. Co.*, 8 Fed. 45; Section 5293, *Compiled Stat. of Oklahoma*, above quoted), but there is no reason to burden this Court with the consideration of that problem. The United States would not be justified in bringing a case to this Court for the purpose of invoking the Packers and Stockyards Act for the protection of business of a marketing agency conducted in violation of its charter and in excess of its corporate authority under the law of its creation.

The record does not suggest that the boycott occurred because the Association was acting *ultra vires* or that the boycotters knew of that before being called to account in the hearing before the Secretary; but if the Producers Commission Association had been detected in the commission of *ultra vires* acts by the purchase of livestock on the yards, that would not justify refusing to deal with it when offering livestock for sale. It had corporate power to sell livestock received from members. Whether it was acting within or without its authority in selling livestock depended upon the source of the livestock. Under such circumstances the Producers Commission Association could not escape the performance of its contracts of sale.

The purchaser would be in no jeopardy. In dealing with efforts of corporations to avoid performance of their contracts, because *ultra vires*, a distinction is sometimes made between contracts entirely and obviously outside the corporate powers, and cases where the contracts within the general scope of the granted powers are *ultra vires* because of some particular circumstances which may not be known to the other contracting party. See *Miners Ditch Co.* v. *Zellerbach*, 37 Cal. 543.

To justify a refusal to buy livestock from such agencies as the Producers Commission Association, having limited powers, because of the possibility of their exceeding their powers by offering livestock obtained from nonmembers, would exclude such cooperative marketing agencies from operating on public stockyards, although their right to do so seems to be expressly recognized by Section 306(f).

The boycott operated against all the business of the Association. The order of the District Court leaves the Association in a position where it is subject to a boycott, although it may confine its business within the limits of its corporate authority. The boycott may continue against its legitimate business,, although as disclosed by the concurring opinions below, it may be open to the Association to amend its charter under the statutes of Oklahoma so as to enable it to broaden its powers and obtain corporate authority to do all that it has done.

We respectfully submit that the judgment below should be reversed, with instructions to the court below to so amend its decree as to permit the enforcement of the order of the Secretary of Agriculture to the extent that it orders the boycott to be abandoned as to the business of the Producers Commission Association in selling livestock and offering it for sale on these stockyards. As the claim of *ultra vires* does not affirmatively appear to have been the motive for the boycott, the decree below should also be amended so as to allow enforcement of the Secretary's order against the boycott, in respect of any business the Association has acquired or may acquire corporate power to transact, by amendment of its articles.

If this Court believes that the clause in Section 5599, Oklahoma Statutes, providing that members of such associations may "hire, rent, or buy their farm supplies and machinery from or through the association" is broad enough to authorize the association to purchase livestock on orders from members, to stock their farms, then the judgment below should be reversed in its entirety.

WILLIAM D. MITCHELL,
Solicitor General.
WILLIAM J. DONOVAN,
Assistant to the Attorney General.
H. B. TEEGARDEN,
Special Assistant to the Attorney General.

FEBRUARY, 1929.

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In the Supreme Court of the United States

OCTOBER TERM, 1928

NO. 513

THE UNITED STATES OF AMERICA,
Appellant,

vs.

AMERICAN LIVESTOCK COMMISSION COMPANY ET AL.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA.

BRIEF OF APPELLEES

Statement.

This action is a suit in equity, arising in the District Court of the United States for the Western District of Oklahoma, and brought under the Packers' and Stockyards Act of 1921, C. 64, 42 Stat. 159, U. S. C. A., Title VII, C. 9, to enjoin the enforcement of an order of the Secretary of Agriculture (R. 34), requiring the appellees herein to cease and desist from certain so-called "unfair and unjustly discriminatory practices and devices," as defined in Section 312-A of said act (U. S. C. A., Title VII, 213-A). The

matter was heard by Circuit Judge Kenyon; District Judge, now Circuit Judge, Cotteral, and District Judge Williams. The Court sustained the petition of the bill and permanently enjoined the enforcement of the Secretary's order. The opinion of the Court will be found in 28 Fed. (2d) 63.

The proceedings before the Secretary of Agriculture were initiated by a complaint (R. 12-15) against the appellees herein and others, charging them with using unfair and unjustly discriminatory practices and devices in connection with the buying and selling of livestock in commerce, by refusing and refraining from buying or selling livestock to either the Producers Commission Association or to the Bollinger & Spencer Livestock Commission Company to their prejudice and disadvantage. A hearing was had, argument presented to the Secretary of Agriculture, after which the Secretary issued his findings of fact and conclusions of law (R. 16), in which he finds (Sec. 6) that the appellees "individually and in concert engaged in and used unfair and unjustly discriminatory practices and devices in connection with the handling, buying or selling of livestock in commerce at said stockyards, as defined in Title III, Sec. 312 of said Act," in that the appellees, while freely engaging in the business of buying and selling livestock with each other, "have persistently refrained and refused from handling, buying or selling from the Producers Commission Association, a co-operative market agency and duly registered and qualified to transact busi-

ness at said stockyards, * * * thereby unjustly and unfairly discriminating against said market agency to their prejudice and disadvantage." The same finding is made with reference to the Bollinger & Spencer Livestock Commission Company. Upon these findings and conclusions, the Secretary bases his order that the appellees:

> "Cease and desist from engaging in and using any unfair or unjustly discriminatory practice or device in connection with the buying and selling of livestock in commerce as defined in said Packers and Stockyards Act at the Oklahoma National Stockyards, to the prejudice and disadvantage of the Producers Commission Association and of the Bollinger-Spencer Livestock Commission Company, at the Oklahoma National Stockyards at Oklahoma City, Oklahoma, in violation of Title III of said act (1) by failing or refusing to buy livestock from or sell livestock to said Producers Commission Association and the Bollinger & Spencer Livestock Commission Company in the ordinary course of business or to enter into any business relations with them with respect thereto, while at the same time engaging in and carrying on business freely among themselves; (2) by combining or agreeing among themselves to refrain from buying livestock from or selling livestock to the Producers Commission Association and the Bollinger & Spencer Livestock Commission Association, and (3) in any other manner shown by the record."

In their bill in equity, appellees contend that the enforcement of the Secretary's order should be enjoined because (1) the Secretary's findings were not based upon competent substantial evidence; (2) the appellees, acting individually, had the right to refuse to buy from or sell to the companies named or any others; (3) the alleged

boycott, or conspiracy, was not in violation of law; (4) the Producers Commission Association, because of its limitation of powers as an association, could not qualify or be classed as a market agency, under the Packers and Stockyards Act, regardless of the fact that the Secretary of Agriculture had allowed it to be registered as such; (5) the cause of action, if it did exist, was, under the evidence, a lawful one.

The District Court held that there was substantial evidence to support the findings of the Secretary of Agriculture that there was a combination or conspiracy among the appellees. However, we take issue with counsel for the Government upon their statement, on page 11 of the Government's brief, that the District Court "further held that there was evidence to support the finding of the Secretary that the plaintiffs were engaged in concert in *unfair and unjustly discriminatory* practices in violation of the act by persistently refraining from and refusing to handle, buy or sell livestock from the Producers Commission Association, a co-operative market agency." After having found that there was substantial evidence to support the Secretary's finding that there was concert of action among the appellees it then became a question of law whether or not, under the circumstances, such concert of action was an unfair or unjustly discriminatory practice against the Producers Commission Association and this is the exact question which the District Court passed upon

adversely to the contentions of the United States. At the hearing in the District Court, counsel for the United States consented to certain modifications of the Secretary's order and in its brief, at page 10, the Government narrows the question to be presented to this Court upon its appeal by this statement: "The question submitted to the Court below thus concerns only the validity of the order in so far as it forbade agreements among the remaining plaintiffs (appellees herein) with the Producers Commission Association." The District Court evidently took this view of the matter as did the counsel for appellees, for it bases its permanent injunction against the enforcement of the Secretary's order upon the ground that the evidence was not sufficient as a matter of law, upon which to predicate the cease and desist order of the Secretary of Agriculture. From this order of the Court the Government prosecutes this appeal.

STATEMENT OF PROPOSITIONS.

The propositions of law relied upon by the appellees for sustaining the opinion and order of the trial court, in addition to those contained and outlined in the opinion of the lower court, are as follows:

1. The testimony at the hearing before the Secretary of Agriculture and before the trial court, although held by the trial court to be sufficient to show a concerted re-

fusal upon the part of the appellees to buy from or sell to the Producers Commission Association is not, in law, sufficient upon which to predicate the cease and desist order of the Secretary of Agriculture, because (a) the Packers and Stockyards Act does not prohibit concerted refusal of market agencies and dealers to buy from or sell to other market agencies or dealers. (b) The powers of the Producers Commission Association are so limited by reason of the provisions of the creating statute that it cannot qualify as a market agency or invoke the protection which the Packers and Stockyards Act affords to legally constituted market agencies.

2. Even though this Court should hold the Producers Commission Association to be a market agency, the appellees should, in no event, be required to trade with it in any manner beyond its expressed and incidental powers, and the burden was on the Government in this proceeding to establish that the attempts of the Association to buy from or sell to the appellees were within the statutory powers of said Association.

3. A presumption cannot be based upon a presumption.

Proposition I-a.

The Packers and Stockyards Act does not prohibit the concerted refusal of market agencies and dealers to buy from or sell to other market agencies or dealers.

ARGUMENT.

The sole power of the Secretary of Agriculture to make any order with reference to buying or selling of livestock by market agencies or dealers is conferred in Section 312-A of the Packers and Stockyards Act of 1921, paragraph 213-a, Title VII, U. S. C. A.

Stripped of all verbiage extraneous to the point at issue, this section provides that:

> "It shall be unlawful * * * to engage in or use any unfair, unjustly discriminatory or deceptive practice or device in connection with * * * the buying or selling * * * in commerce at a stockyard of livestock."

The whole complaint of the Secretary of Agriculture and of the Producers Commission Association was that the appellees would not do business with them. Their complaint was not that the appellees used any unfair or unjustly discriminatory practice or device in buying from or selling to the Producers Association. The complaint was that the appellees refused to buy from or sell to the Producers Association.

The order of the Secretary of Agriculture is based upon a finding and conclusion that the appellees, individually and in concert, refused to buy from or sell to the Producers Commission Association. It is not even held

anywhere in the Secretary's findings, conclusions or order that the appellees, or any of them, individually or acting in concert, used any unfair or unjustly discriminatory practice or device in any buying or selling transaction with the Producers Commission Association. Prior to the passage of the Packers and Stockyards Act, this Court held that the business of buying and selling cattle by commission men and traders was not included in interstate commerce, and, therefore, not to be controlled or regulated by the United States or any department thereof. See *Hopkins* v. *U. S.*, 171 U. S. 578. This opinion, as we see it, has never been overruled by this Court, but has been explained, as we shall see later, in the case of *Stafford* v. *Wallace*, 258 U. S. 496, 66 L. ed. 735. The language of the Packers and Stockyards Act nowhere indicates that the act is intended to prevent a group of men, whether acting individually or in concert, from deciding with whom they will deal. The law upon this point, prior to the passage of the Packers and Stockyards Act, was enunciated by the Supreme Court of the United States in the case of *Anderson* v. *United States*, 171 U. S. 604. The syllabus of that case is as follows:

> "An agreement among persons engaged in the common business, as yard traders, of buying at a city stockyard cattle which came from different states, that they will form an association for the better conduct of their business, and that they will not transact business with other yard traders who are not members of the association, is not a violation of the act of July 2, 1890, to protect trade and commerce against unlawful restraints and monopolies.

"A rule of a livestock exchange, that its members shall not recognize any yard trader who is not also a member of the exchange, is not in restraint of, or an attempt to monopolize, trade, where the exchange does not itself do any business, and there is nothing to prevent all yard traders from being members of the exchange, and no one is hindered from having access to the yards or having all their facilities, except that of selling to members of the exchange.

"Rules to enforce the purpose and object of such exchange, if reasonable and fair, cannot, except remotely, affect interstate trade and commerce, and are not void as violations of the act of July 2, 1890."

In the body of the opinion, at page 615, it is said by Mr. Justice Peckham, for the Court:

"In the view we take of this case we are not called upon to decide whether the defendants are or are not engaged in interstate commerce, because if it be conceded they are so engaged, the agreement, as evidenced by the by-laws, is not one in restraint of that trade, nor is there any combination to monopolize or attempt to monopolize such trade within the meaning of the act."

Congress undoubtedly knew the position of the United States Supreme Court upon this subject. It knew that the Supreme Court had said a refusal in concert to deal with non-members was not violative of the commerce act, yet Congress utterly fails to include in the Packers and Stockyards Act any language by which it can be reasonably inferred that it intended to prohibit the organization of market agencies and dealers into associations through which they might refuse to buy or sell from or to an outsider. In other words, we feel that Congress intended to

leave this matter in the same status as it had been since the decision in the Anderson case, *supra.*

We think that our position upon this point is strengthened by the opinion of Chief Justice Taft, in the case of *Stafford* v. *Wallace, supra.* In this case, as well as in the companion case of *Burton* v. *Clyne,* 258 U. S. 496, 66 L. ed. 735, the Supreme Court had before it the validity of the Packers and Stockyards Act and in directing attention to the evident intent of Congress in the passage of the act the Supreme Court, at page 515, said:

> "The chief evil feared is the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper who sells, and unduly and arbitrarily to increase the price to the consumer who buys. Congress thought that the power to maintain this monopoly was aided by control of the stockyards. Another evil which it sought to provide against by the act was exorbitant charges, duplication of commissions, *deceptive practices in respect to prices, in the passage of the livestock through the stockyards,* all made possible by collusion between the stockyards management and the commission men, on the one hand, and the packers and dealers on the other. Expenses incurred in the passage through the stockyards necessarily reduce the price received by the shipper, and increase the price to be paid by the consumer. If they be exorbitant or unreasonable, they are an undue burden on the commerce which the stockyards are intended to facilitate. Any unjust or deceptive practice or combination that unduly or directly enhances them is an unjust obstruction to that commerce. The shipper whose livestock are being cared for and sold in the stockyards market is ordinarily not present at the sale, but is far away in the West. He is wholly dependent on the commission men. The packers and

their agents, and the dealers who are the buyers, are at the elbow of the commission men, and their relations are constant and close. The control that the packers have had in the stockyards by reason of ownership and constant use, the relation of landlord and tenant between the stockyards owner, on the one hand, and the commission men and the dealers, on the other, the power of assignment of pens, and other facilities by that owner to commission men and dealers, all create a situation full of opportunity and temptation, to the prejudice of the absent shipper and owner in the neglect of the livestock, in the *mala fides* of the sale, in the exorbitant prices obtained, in the unreasonableness of the charges for services rendered."

At page 517 the Court said:

"The Swift case presented to this Court the sufficiency of a bill in equity brought against substantially the same packing firms as those against whom *this legislation is chiefly directed.*"

In the discussion by the Supreme Court in the *Stafford* v. *Wallace* case, of *Hopkins* v. *United States, supra,* and *Anderson* v. *United States, supra,* the Court said:

"So, again the line is distinct between this case and *Hopkins* v. *United States,* 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40. All that was decided there was that the local business of commission merchants was not commerce among the states, even if what the brokers were employed to sell was an object of such commerce. *The brokers were not like the defendants before us, themselves the buyers and sellers. They only furnish certain facilities for the sales.* Therefore, there again the effect of the combination of brokers upon the commerce was only indirect and not within the act. Whether the case would have been different if the combination had resulted in exorbitant charges was left open. In *Anderson* v. *United States, supra,* the defendants were buyers and sellers at the stockyards,

but their agreement was merely not to employ brokers, or to recognize yard traders who were not members of their association. Any yard trader could become a member of the association on complying with the conditions, and there was said to be no feature of monopoly in the case. It was held that the combination did not directly regulate commerce between the States, and, being formed with a different intent, was not within the act * * *.

"Again, if the result of the combination of commission men in the Hopkins case had been to impose exorbitant charges on the passage of the livestock through the stockyards from one State to another, the case would have been different as the court suggests. The effect on interstate commerce in such a case would have been direct. *Similarly, in the Anderson case, if the combination of dealers had been directed to collusion with the commission men to secure sales at unduly low prices to the dealers, and to double commissions, or to practice any other fraud or oppression calculated to decrease the price received by the shipper and increase the price to the purchaser in the passage of livestock through the stockyards to subordinate commerce, this would have been a direct burden on such commerce and within the anti-trust act*" (Italics ours).

It seems to us that by this language the Supreme Court has reaffirmed the doctrine announced in the Hopkins case and the Anderson case and has in all intents made a finding that the law, with reference to the organization of livestock exchanges and the right to refuse to deal with non-members, is not interfered with by the Packers and Stockyards Act, in any way, except in such instances as are pointed out in the above decision. In the case at bar, none of the exceptions mentioned by Chief Justice Taft

appears from the record. There is no showing that interstate commerce has been disturbed in any way.

We are not unmindful of the fact that one of the members of the trial court was a member of the Senate at the time of the passage of the act and had much to do with the passage of legislation looking to the benefit of the agricultural interests as well as the other interests of the country. We know that he and other members of Congress understood the law as it had been interpreted by the United States Supreme Court. For that reason the omission from the Packers and Stockyards Act of language, which would indicate the intent of Congress to prohibit concerted action by exchanges or commission men and dealers in refusing to buy from or sell to others, becomes more significant.

What would be a reasonable construction of the language used in the Packers and Stockyards Act, prohibiting unfair and unjustly discriminatory practices and devices in the buying, selling, marketing, etc., of livestock at a stockyard?

Keeping in view the language of Chief Justice Taft in *Stafford v. Wallace*, supra, that the principal object of the act was to break the power of the packers in their attempt to control and monopolize the stockyards, the market agencies and the dealers, it seems to us that this language is meant to protect shippers to the stockyards instead of being meant to force any market agency or a member of market agencies to buy from or sell to some other

market agency. That this language is meant to protect shippers of livestock from misrepresentation and fraud, from exorbitant charges, from deceitful reports as to the price at which cattle were sold and many other acts, which might be enumerated, directly affecting the interests of the shippers, who, in many instances, are not on the market to protect themselves. In other words, to compel the stockyards owner, the commission agent and the dealer to act with the utmost good faith toward the shipper and also to prohibit unfair and deceitful practices between the stockyards owner, the market agency and the dealer in those transactions, *which they actually have* had with each other. This would not be a strained construction and would not call for any judicial legislation. However, when nothing at all is said in the act about a refusal to deal, to buy, to sell, either individually or in concert, of one or a group of agencies or dealers with some other agencies or dealers, it seems to us that to read such a meaning into the act would be usurping the power of Congress *in making law rather than the construction of a law already made*.

If we are correct in this contention, the evidence was, in law, insufficient upon which to predicate the cease and desist order of the Secretary of Agriculture.

Proposition I-b.

The testimony adduced in this case is insufficient as a matter of law upon which to predicate the cease and desist order of the Secretary of Agriculture for the reason that the powers of the Producers Commission Association are so limited by the provisions of the creating statute that it cannot qualify as a market agency or invoke the protection which the Packers and Stockyards Act affords to legally constituted market agencies.

ARGUMENT

The Producers Commission Association was organized in 1924 under the provisions of Sections 5598 to 5621, inclusive, Compiled Oklahoma Statutes of 1921, as amended by Chapter 181, Session Laws of 1923. For the sake of brevity we only quote those portions of this act which set forth the powers of the Association, and such other portions as seem necessary to this phase of the discussion.

> "Section 5599. Any number of persons, not less than five, engaged in the production of agricultural or horticultural products, may act together and organize cooperative associations, *not having capital stock, and not conducted for profit, for mutual help* in collectively processing, preparing for market, picking, storing, shipping, handling and *marketing such products of persons so engaged*; and the manufacturing or the making of the by-products thereof; or in the financing any of the above activities; and *may have marketing agencies in common with other like or similar associations;* and such associations and their members may make all necessary contracts and agreements to effect such purposes; and such associations may make advances to members, *and such members may rent, hire or buy their farm supplies and machinery from or through the association;* provided that such *association shall be operated for the mutual benefit of the members thereof, only as producers* * * *."*

The remainder of the section has no bearing on the matters at issue here.

"Section 5600. An association, in processing, preparing for market, handling and marketing *such products of persons so* engaged, which shall include any by-products thereof as well, may, in addition to all other powers given by this act, and to effect the purposes of this act, pledge, hypothecate, mortgage, market or sell any such products as effectively as may be done by the member or members owning the same, or such associations may acquire title thereto, and pledge, hypothecate, mortgage, market and sell the same.

"Section 5601. The persons uniting to form an association shall enter into Articles of Association in writing, which shall state:

* * * * * * *

"(b) The class of service to be performed for its members, which services shall be among those mentioned in sections two and three of this act.

* * * * * * *

"(g) * * * The words 'Articles of Incorporation' and 'Articles of Association' shall be taken as meaning the same.

"Section 5603. Upon filing by the county clerk of the copy of the Articles of Association transmitted to him by the Secretary of State, * * * the Association shall have power, *within the limitations of this act*:

"(c) To *perform for its members services prescribed in its Articles of Association*, and to exercise with respect to such services all the rights and powers herein given.

"(e) To purchase, lease or receive by gift, bequest or devise and to hold real and personal property necessary in the conduct of its operations and to dispose of same; and to process, prepare for market, handle, pledge, hypothecate, mortgage, market or sell any and all such products mentioned in sections 2 and 3 of this

act, or to acquire title thereto and to process, manufacture, can, pick, store, ship, prepare for market, handle, pledge, hypothecate, mortgage, market or sell the same and the action of the Association in pledging, hypothecating, mortgaging, encumbering, marketing or selling any such products, shall be conclusive on all members of the Association.

"(j) *To enter into all necessary and proper contracts and agreements and make all necessary and proper stipulations, agreements and contracts and arrangements with any other co-operative association or associations* formed in this or in any other State for the co-operative and more economical carrying on of its business or any part or parts thereof * * *.

"(p) To do each and everything necessary, suitable or proper for the accomplishment of any one of the purposes * * * enumerated in this act * * *; and in addition thereto to exercise and possess all rights, powers and privileges necessary or incidental to the purpose for which the Association is organized * * *; and in addition, any other rights, powers and privileges granted by the laws of this State to ordinary corporations, *except such as are inconsistent with the express provisions of this act* * * *.

"Section 5604. *Under the terms and conditions prescribed in the by-laws adopted by it, the Association may admit as members only persons engaged in the production of horticultural or agricultural products to be handled through or by the Association.* * * *.

"Section 5608. No Association organized hereunder shall handle the agricultural or horticultural product of any non-member except for storage" (Italics ours).

It is apparent from the act that this Association (1) is one not having capital stock and not conducted for profit; (2) that it is formed for the *mutual help of its members in marketing the agricultural and horticultural products*

of its members; (3) that it may have marketing agencies in common with other like or similar associations; (4) that the Association shall be operated for the mutual benefit of the members thereof *only as producers;* (5) that the members of the Association may hire, rent or buy their farm supplies and machinery from or through the Association; (6) that the Association may, under certain conditions, market or sell the products and by-products of its *members*, or the Association may acquire the title of such property of its members; (7) the Association cannot handle the agricultural or horticultural products of any non-members, except for storage. The Producers Commission Association had no power to buy any of the livestock on the Oklahoma City yards, *except such livestock as might be shipped to it by its members as the producers of such livestock.* It could not buy livestock from any other market agency or dealer on the yards. It had only the power to sell such livestock as might be consigned to it *by its members.* We assume it will not be disputed that these limitations upon the power of the Producers Commission Association could not be enlarged by the provisions of the Packers and Stockyards Act or by any other power except its creator, the State of Oklahoma, and that its powers and authority are to be measured by the law of its creation.

We offer the following citations, among the hundreds of cases, which sustain this doctrine: In *Central Trans-*

portation Co. v. *Pullman*, 139 U. S. 24, 35 L. ed. 55, this Court, in the syllabus, uses the following language:

> "The charter of a corporation, read in the light of any general laws which are applicable, is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental; all contracts made by a corporation beyond the scope of those powers are unlawful and void.
>
> "A contract made by a corporation which is beyond the powers conferred upon it by the Legislature, and which involves an abandonment by the corporation of its duty to the public, is unlawful and void.
>
> "A contract between two corporations, in order to bind either of them, must be within the corporate powers of both.
>
> "A contract of a corporation which is beyond the powers conferred upon it by the Legislature is not voidable only, but wholly void; it cannot be ratified by either party; no performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it."

In the body of the opinion the Court says:

> "Upon the authority and the duty of a corporation to exercise the powers granted to it by the Legislature, and those only; and upon the invalidity of any contract, made beyond those powers, or providing for their disuse or alienation—there is no occasion to refer to decisions of other courts, because the judgments of this Court, especially those delivered within the last twelve years by the late Mr. Justice Miller, afford satisfactory guides and ample illustrations."

And, at page 64, the Court further says:

> "The clear result of these decisions may be summed up thus: The charter of a corporation read in the light of any general laws which are applicable, is the meas-

ure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental. All contracts made by a corporation beyond the scope of those powers are unlawful and void, and no action can be maintained upon them in the courts, and this upon three distinct grounds: the obligation of everyone contracting with a corporation, to take notice of the legal limits of its powers; the interest of the stockholders, not to be subjected to risks which they have never undertaken; and, above all, the interest of the public, that the corporation shall not transcend the powers conferred upon it by law."

In the case of *Augusta Bank* v. *Earle*, 13 Peters (U. S.) 519 (587), 10 L. ed. 274, Mr. Chief Justice Taney said:

"It may be safely said that a corporation can make no contracts and do no acts, either within or without the State, which creates it, except such as are authorized by its charter, and those acts must also be done by such officers or agents, and *in such manner* as the charter authorizes."

In *Head* v. *Providence Ins. Co.*, 2 Cranch (U. S.) 127 (167), 2 L. ed. 229, Chief Justice Marshall, speaking for the Court, used this language:

"Without ascribing to this body, which, in its corporate capacity, is the mere creature of the act to which it owes its existence, all the qualities and disabilities annexed by the common law to ancient institutions of this sort, it may correctly be said to be precisely *what the incorporating act has made it*, to derive all powers from that act and to be capable of exercising its faculties only in the manner which that act authorizes. *To this source of its being then*, we must recur to ascertain its powers."

In the case of *Peck-Williamson & Co.* v. *Board of Ed-*

ucation, 6 Okla. 280, the Supreme Court of this State, speaking through Justice McAtee, said:

> "The plaintiff was a corporation chartered for 'the purpose of manufacturing and selling heating and ventilating apparatus' and for no other purpose and had no power by its officers to become a negotiator or broker of bonds upon commission. The charter of the plaintiff was full and sufficient notice to the defendant of the limitations of the plaintiff's authority in that respect."

See, also:

> *Myatt* v. *Ponca City Land & Improvement Co.*, 14 Okla. 189.

In the case of *Derr et al.* v. *Fisher et al.*, 22 Okla. 126 (143), Justice Dunn, speaking for the Court and quoting from *Richelieu Hotel Co.* v. *International Military Encampment Co.*, 140 Ill. 248, 29 N. E. 1044, used this language:

> "We understand the rule to be that corporations have such powers as are expressly given them by the law which authorizes their creation and such other powers as are necessarily incidental to the proper exercise of such express powers. The express powers are readily ascertained from the statute of the charter of the corporation * * *. The incidental powers are such as are necessary to the efficient exercise of the express powers."

Measuring the powers of the Producers Commission Association to buy and sell livestock by the yardstick of the United States Supreme Court and the Oklahoma Supreme Court, we are driven to the conclusion that, under the law by which the Producers Commission Association

was created, it could not, in any event, become a market agency, except that, it might do business with, buy from and sell to organizations similar to it.

The only functions which the Government contends that this Association could perform with reference to livestock, under its statutory powers, were: (1) sell livestock, on a commission basis, produced and owned by its members; (2) buy livestock from its members and sell such livestock as the owner. In the first instance, it would be assuming to act as a market agency. In the second instance, it would be attempting to act as a dealer, as defined in Section 301 of the Packers and Stockyards Act. This hydra-headed Doctor Jekyll and Mr. Hyde characteristic of this Association is recognized and admitted by the Government on page 17 of its brief. In other words, it could act as agent for its members along certain limited lines and as its own principal along certain other limited lines. We do not believe that it was the intent of Congress to extend the protection of the Packers and Stockyards Act to any person or organization assuming to act thereunder as both principal and agent. The knowledge was within its own bosom as to when it was Doctor Jekyll and when it was Mr. Hyde; that is, as to when it was selling livestock as a market agency and when it was selling stock as a dealer. No one else could have that information. But the record shows that the Association was registered by the Secretary of Agriculture as a market agency

and not as a dealer. We recognize the fact that co-operative organizations, when clothed with proper powers by the statutes of their creation, may become either market agencies or dealers or even stockyards owners, as the case may be, and that when they are clothed with proper statutory authority they may claim all the benefits and protection and must assume all the burdens cast upon them by the Packers and Stockyards Act, but to recognize such an Association as this to be a market agency, as defined by the Packers and Stockyards Act, would, we think, be arbitrary and unreasonable. To say that the refusal of other market agencies, whether acting individually or in concert, to do business with such agency constitutes an unfair or unjustly discriminatory practice would be placing an unreasonable and unjust burden upon the other market agencies so charged.

The ordinary market agency both buys and sells upon a commission. It does not buy or sell in any other way. The ordinary livestock dealer, as defined by the Packers and Stockyards Act, buys from whom and sells to whom he chooses and is not circumscribed by limitations as to membership or otherwise. It certainly would be unfair, unreasonable, unjust and arbitrary to compel livestock agencies and dealers to carry on the one-sided business of buying from an association, when that association has no power and could not be compelled, because it does not have the authority, to buy from other market agencies or dealers.

Under the statute, by which this Association is created, how could any of these plaintiffs safely undertake to deal with the Producers Commission Association and how could they legally be charged with a conspiracy to refuse to enter into contracts with the Producers Commission Association, which that Association had neither the power to make nor to execute? It is fundamental that a conspiracy must be against a lawful act; that is, an act lawful to the party against whom the conspiracy is alleged to exist. Who would say that it is unlawful or that it would be an unfair or unjustly discriminatory practice or device to enter into a concerted action or agreement with other persons for the purpose of keeping either the Producers Commission Association or any other individual or corporation from committing theft, murder, arson or any other unlawful act, whether *malem in se* or *malem prohibitum*, whether unlawful civilly or unlawful criminally?

The lower court held that, on account of the peculiarly limited powers of the Producers Association, it did not qualify as a market agency and this was one of the grounds for the court's decision adverse to the contention of the Government. There is, and was at the time of the organization of the Producers Commission Association, a perfect procedure laid down by the laws of the State of Oklahoma for the organization of co-operative corporations, which could, in every respect, fulfill the requirements of the law as to stockyards owners, market agencies or deal-

ers. We refer to Sections 5637 to 5652, inclusive, being Article XIX, Chap. 34, C. O. S. 1921, which is made a part of this record upon appeal. We quote so much thereof as seems necessary for this discussion:

"Section 5637. Corporations Authorized—Purposes. Ten or more persons may form a corporation for the purpose of conducting an agricultural, dairy, livestock, irrigation, horticultural, mercantile, manufacturing, mechanical or industrial business upon a co-operative plan, and, with their associates, successors and assigns may become and be a body politic and corporate by complying with the provisions of this act.

"Section 5638. Articles of Incorporation. The incorporators shall sign and acknowledge, in the manner required for the signing and acknowledgment of deeds, a certificate of incorporation showing the following facts: (1) The corporate name. (2) The purpose of corporation. (3) The amount of capital stock. (4) The number of shares, and the par value of the shares into which the capital stock is divided. (5) The term of the corporate existence. (6) The number of directors, not less than five and the names and addresses of the incorporating directors who shall manage the concerns of the corporation for the first corporate year. (7) The name of the town or post office and the county where the principal office or place of business of the corporation shall be located. (8) Any further provision, not inconsistent with law, which the incorporators may deem expedient to be embodied in such certificate.

"Section 5639. Filing of Articles—Certificate—The articles of incorporation shall be filed with the Secretary of State whereupon he shall issue to the corporation over the Great Seal of the State of Oklahoma, a certificate that the articles containing the required statement of facts have been filed in his office, and thereupon the persons signing the articles and their associates, successors and assigns shall be a body

politic and corporate by the name and for the purposes stated in said article. Provided, that any corporation doing business as mentioned in section one, now operating in the State of Oklahoma, may, at a regular or special meeting of the shareholders called for such purpose, by a majority vote elect to operate under the provisions of this act, after the action taken at such meeting shall be properly certified by the secretary of such corporation to the Secretary of State.

"Section 5641. Powers. Each corporation formed under the provisions of this act shall have power: (1) To have succession by its corporate name for the period limited in its certificate. (2) To sue and be sued, complain and defend in any court. (3) To establish and use a common seal and alter the same. (4) To hold, purchase and convey real and personal property as the purpose of the corporation may require, including stock in subsidiary or allied co-operative corporations within or without the State. (5) To appoint such officers and agents as the business may require, including in every case a president and secretary, and to fix their compensation. (6) To make by-laws not inconsistent with law for the management of its property, the regulation of its business and the transfer of its stock. (7) To exercise all other lawful powers necessary or proper for the exercise of the powers herein conferred.

"Section 5648. Dividends and Profits — Reserved Fund. The directors, subject to revision by the stockholders, at any general or special meeting lawfully called, shall apportion the net earnings and profits thereof from time to time at least once in each year in the following manner:

"(1) Not less than ten per cent thereof accruing since the last apportionment shall be set aside in a surplus or reserve fund until such fund shall equal at least fifty per cent of the paid up capital stock.

"(2) Dividends at a rate not to exceed eight per cent per annum, may, in the discretion of the directors,

be declared upon the paid up capital stock. Five per cent may be set aside for educational purposes.

"(3) The remainder of such net earnings and profits shall be apportioned and paid to its members ratably upon the amounts of the products sold to the corporation by its members, and the amounts of the purchases of members from the corporation; provided, that if the by-laws of the corporation shall so provide the directors may apportion such earnings and profits in part to non-members upon the amounts of their purchases and sales from or to the corporation."

This act was passed by the Legislature of Oklahoma in 1919. The powers of the co-operative corporation, formed under the provisions of the 1919 Act, are very broad. Under that act the co-operative corporation is allowed to buy and sell the products of non-members as well as of members. It can do a general agricultural, *dairy, livestock, irrigation*, horticultural, *mercantile, manufacturing, mechanical or industrial business upon a co-operative plan.* However, under that act, there must be a capital stock and the subscribers to the capital stock have the financial responsibility of the ordinary corporation shareholder. If the Producers Commission Association had desired, it could have incorporated under the Act of 1919 and would thereby have brought itself within the provisions for the organization of co-operative associations by the Packers and Stockyards Act. Not having done so, but having elected to organize under a statute which gives it such limited powers, it cannot be heard to complain, because of the limitations to which it has voluntarily subscribed.

There is a difference between the expressed purposes of the co-operative association authorized by the Statute of 1923, under which the Producers Commission Association was organized, and the expressed purposes of the ordinary co-operative corporation organized under the general law of 1919, just mentioned, which, in our opinion, must be decisive of this case contrary to the contentions of the Government. Section 5599 of the Comp. Oklahoma Stats. 1921, names the purposes for which the Producers Commission Association might be organized under the statute of its creation as follows:

> "Any number of persons, not less than five, engaged in the production of agricultural or horticultural products, may act together and organize co-operative associations not having capital stock and not conducted for profit, for mutual help in collectively processing, preparing for market, picking, storing, shipping, handling and marketing such products of persons so engaged; and the manufacturing or the making of the by-products thereof; or in the financing of any of the above activities."

Section 5637, defining the purposes for which co-operative corporations may be organized, provides that:

> "Ten or more persons may form a corporation for the purpose of conducting an agricultural, dairy, *livestock*, irrigation, horticultural, mercantile, manufacturing, mechanical or industrial business upon a co-operative plan" (Italics ours).

The Legislature of 1919, by this provision just quoted, had already recognized the distinction between a livestock business and an agricultural or horticultural business, as

applied to co-operative enterprises. In 1923, when the Legislature of Oklahoma enacted the bill, under which the Producers Commission Association is organized, it did not mention the livestock business as being one of the purposes for the organization of an association under its provisions.

Having already established, in the 1919 Act dealing with co-operative enterprises, a statutory distinction between *tgricultural*, dairy, livestock, irrigation, *horticultural*, mercantile, manufacturing, mechanical and industrial businesses on a co-operative plan, we conclude that the failure to include any but horticultural and agricultural products in the 1923 Act as the subject of that legislation was done with the purpose in view of denying to persons who might desire to engage, co-operatively, in the dairy, livestock and other commercial businesses, the benefit of the provisions of that act. It seems to us that there could not be a more manifest intention upon the part of the Legislature that the maxim, "*Expressio unius est exclusio alterius*," should apply.

We assert that a reading of the entire statute, under which the Producers Commission Association was formed, in comparison with Article XIX, Chap. 24, C. O. S. 1921, dealing with the organization of co-operative corporations, will, in our opinion, convince any student of statutory construction that it was not the intention of the Legislature of the State of Oklahoma to grant power to any association

organized under the 1923 law to engage in a livestock commission business or any other industrial or mercantile business, but its entire plan, scope and purpose was to give to the farmers of the communities a co-operative plan, by which they might economically process, gather, handle, market and sell their products of the soil.

There is another interesting situation which presents itself in this case in the construction of the Statute of Oklahoma as applied to the provisions of the Packers and Stockyards Act. Judge Kenyon, as has already been pointed out, probably knows more about the intent of Congress in the passage of the Packers and Stockyards Act than any other judge upon the bench, for the reason that so far as we know he is the only person on the bench today who was a member of Congress at the time of the passage and who assisted in the passage of that act. Judge Williams, District Judge for the Eastern District of Oklahoma, was a member of Oklahoma's Constitutional Convention and for years Associate Justice and Chief Justice of the Supreme Court of the State of Oklahoma. Judge Cotteral has been upon the United States District bench in the State of Oklahoma since the admission of Oklahoma into the Union. We believe that no two men could be found better qualified to pass upon the meaning, intent and purpose of Oklahoma Statutes than the two distinguished jurists last mentioned. With the peculiar knowledge of Judge Kenyon as to the Packers and Stockyards Act, coupled with the intimate

knowledge of Judges Cotteral and Williams, as to the spirit, intent and proper interpretation of the laws of the State of Oklahoma, we know of no other tribunal to be found upon the trial bench more competent to correctly interpret and reflect the spirit of the laws involved.

But, it might be said, that the Producers Commission Association had some kind of a *de facto* power to buy and sell freely and without limitation upon the Oklahoma City market, and, therefore, such business as it did, or offered to do, should be held by reason of such *de facto* power to be legal. But the cases, so far as we know, universally held that, while there is such a thing as the exercise of power by a *de facto* corporation, there is no such thing known to the law as the exercise of a *de facto* power by a corporation, which legally exists and has prescribed powers. 14-A C. J. 249, note 73; *Baca, etc., Ry. Co.* v. *Sierra Valley Ry. Co.* (Cal.), 84 Pac. 298, and *Gillette* v. *Aurora Ry. Co.*, 228 Ill. 261, 81 N. E. 1005.

We believe that, under this proposition, the order of the lower court must be sustained.

Proposition II.

The burden rested upon the Government in this proceeding to show that the attempts of the Producers Commission Association to buy from or sell to appellees were within the statutory powers of the Association.

ARGUMENT

Appellant, at pages 13 and 14 of its brief, states under four heads the propositions upon which it asserts the trial court erred in holding that the cease and desist order of the Secretary of Agriculture should be enjoined. However, we think the four assignments of error are epitomized in the first assignment, wherein the appellant complains that:

> "The District Court erred in holding that either in the hearing before the Secretary or in the District Court the burden was upon the Government to negative the allegation that the Producers Commission Association was acting *ultra vires*, and in holding that the burden was upon the Government to establish affirmatively that the livestock offered for sale by the Producers Commission Association on these stockyards came from members."

The Government, in its summary of argument, page 14 of its brief, complains that "there is nothing in the record to suggest that the boycott of the Producers Commission Association resulted because that Association was exceeding its powers."

However, that is beside the question. If appellees had the right to refuse in concert not to deal with the Producers Commission Association, what their expressed or

unexpressed reason was for so doing is of no consequence. It would be a dangerous doctrine to announce that a party may be punished for doing that which he had a right to do if, in the judgment of some governmental department, his motive were unworthy. Such a theory is not consonant with law, reason or justice. "As long as a man keeps himself within the law by doing no act which violates it, we must leave his motives to Him who searches men's hearts."

In *Adler* v. *Fenton*, 24 Howard 407, 16 L. ed. 696, this Court announced that "an act legal in itself and violating no right, cannot be made actionable on account of the motive which superinduces it. It is the province of ethics to consider of actions in their relation to motives, but jurisprudence deals with actions in their relation to the law, and for the most part, independent of motive."

In the case of *Warax* v. *Cincinnati, N. O. & T. P. R. Co.*, 72 Fed. 637, Justice Taft said, "If the right exists, the motive for its exercise cannot defeat it."

This doctrine holds true with reference to concerted action, unless it is shown that the concert of action was for the purpose of doing an unlawful act. We have never yet heard the theory urged that a concerted refusal to engage with another in an unlawful act, regardless of the motive for such refusal, could be classed as an unfair or unjustly discriminatory practice or device.

This is the position taken by the trial court when it says:

"Plaintiffs complain of the order in this case on the ground that the Association was not authorized within its corporate powers to buy and sell livestock at this yard, and hence they were not obligated to deal with or recognize it or subject to this coercive order respecting the transactions in question. We think their position is well taken, and that it must be immaterial on what ground they seek to justify their conduct, so long as they were within their rights * * *.

"It is clear that this Association was authorized only to buy and sell livestock of its members. Any other transactions were outside of its express and incidental powers. No testimony has been pointed out as to the transactions of the Association, except that its manager and salesman bought and sold livestock at the yard, and none that they sold livestock of the members of the Association. It was incumbent upon the Government to show its right to engage in these transactions.

"Where the State Legislature has seen fit to thus limit the powers of an organization, the buying and selling of livestock of others by it at the stockyards were acts that were *ultra vires*, or, more accurately stated, wholly illegal in character. It is to be said that even if plaintiffs had contracted with this Association and the contracts were executory, they could not be enforced * * *. The plaintiff, therefore, not only had no duty to recognize the agents of the Association, but it was their absolute right to refrain from dealing with them."

We think no clearer statement of the law could be made.

The Government admits in its brief (page 18) that the Association was exceeding its corporate authority in its *ultra vires* attempts to buy stock from the appellees. The

Government also admits in its brief (page 17) that it was acting as a "dealer" and not a "market agency" when engaged in selling livestock which it had purchased from its members. In the first instance, it was violating the statutes under which it was created. In the second instance, it was transcending its alleged authority and privilege under the status which the government claims for it as a market agency. Appellees are charged with having failed to deal with it as a "market agency." Its action in buying stock from appellees or in selling appellees stock which it owned was unlawful and *ultra vires*.

There is then not a single lawful function which it could perform except the sale on commission of the livestock of its members. The Government says that a "general presumption of right acting attends a corporation, the effect of which is to place the burden of proof that an act done or contract made was *ultra vires* upon him who alleges that fact as the foundation of his action or defense." The Government cites three authorities upon this proposition, and calls attention to others.

This is probably a correct general statement of the law, but it is not applicable to the case at bar. In the first place, this is not an action between parties to an illegal or *ultra vires* contract. It is not a case where property has been acquired in excess of corporate powers, nor a case where the parties have so dealt with each other that one of them is estopped from pleading a want of corporate

power to act. This is not a case where any "act was done or contract made;" on the contrary, it is a case where there was a positive refusal to do an act or enter into a contract.

At any rate, just how far does the general presumption attend the legality of the actions of a corporation? Just how long is a corporation clothed with the presumption that its actions are such as are authorized by law?

In the case at bar, all of the acts of the Producers Commission Association in buying and selling upon which there is any proof are shown to have been illegal, *ultra vires* and void.

Can it be said that any presumption will or should be indulged as to the legality and validity of other acts of selling concerning which the legality or illegality is not shown by the proof? We think such a presumption would do violence to the canons of sound law, good reason and common sense.

As we have already pointed out, this is not an action between the parties to a contract. This is a quasi-criminal action brought by the Government of the United States, not because of any act done or contract entered into or performed, but because of the refusal of the appellees to act or contract with the Producers Association.

In this character of an action the Government can well say (page 15, Government's brief), that "We have no rea-

son to insist that the transactions of the Producers Commission Association, outside of its corporate powers, should receive the protection of the provisions of the Packers and Stockyards Act."

In the case of *McMullen* v. *Hoffman*, 174 U. S. 658, 43 L. ed. 1117 (1124), this Court used the following language:

> "Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract, and void for the same reasons. Wherever the contamination reaches, it destroys. The principle to be extracted from all the cases is that the law will not lend its support to a claim founded upon its violation."

Appellant, under the reasoning of the above case, might have gone further and said that law, reason and the ordinary desire for justice demand that any individual, firm or corporation seeking the protection of this or any other arm of the Government must affirmatively, and without relying upon doubtful presumptions, show itself entitled to that protection before the might and majesty of the Government will be sent to its aid.

Under the decision of the trial court as to the evidence of concert of action among appellees, if the Producers Commission Association was entitled to the benefits and protection afforded a "market agency" under the provisions of the Packers and Stockyards Act; if its actions were lawful, then a cease and desist order might be sustained.

On the other hand, if the Association was not, on account of its statutory limitations, or for other reasons, a market agency, it was not lawfully assisting in the movement of livestock in commerce, and would not be entitled to the protection of the Packers and Stockyards Act. If, being a market agency in a limited sense and with limited powers, its acts in the sale or purchase of livestock were *ultra vires* and void, the appellees could not lawfully be ordered to cease and desist from refusing to join with the Association in such unlawful acts.

Under the limited powers of the Association it became necessary for the Government to affirmatively show that the acts of the Association were lawful, especially in view of the fact that the record shows that all of its explained acts were unlawful and does not show that any of its acts were lawful.

The knowledge as to whether or not the Producers Commission Association was acting in a lawful manner in its efforts to sell to the appellees was peculiarly in the hands of the Government. Within the bosom of the Government's witnesses reposed the knowledge as to whether the Association had a membership; as to whether those members were producers of livestock; as to whether those members were consigning that livestock to the Producers Commission Association for sale upon commission as a market agency; as to whether the livestock which the Association was attempting to sell was the property of non-

members or of members; as to whether the livestock which the Association was attempting to sell was or was not the property of the Association and, therefore, whether the Association was attempting to act as a "market agency" or as a dealer. With this testimony and this knowledge peculiarly within the possession of the United States, it cannot deny that it knew the facts. The burden was upon the Government to produce those facts and that testimony, and having failed so to do with reference to the livestock which the Producers Commission Association desired to sell, it must be presumed that the testimony would have shown that the stock did not belong to the members of the Associtaion (if there were any such members), and that the Association had not received the stock from its members for sale upon commission, and that the actions of the Association in attempting to sell livestock were therefore unlawful and *ultra vires*.

In the case of *Groves* v. *United States*, 150 U. S. 118, 37 L. ed. 1021, this Court said:

> "The rule, even in criminal cases, is that if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transactions, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable."

See, also, *Runkle* v. *Burham*, 153 U. S. 217, 38 L. ed. 694.

In the case of *United States* v. *Grogg*, 9 Fed. (2d) 425, the following language is found in the syllabus:

"Where subject-matter of negative averment is peculiarly within the knowledge of the adverse party, averment is taken as true, unless disproved by adverse party."

In the body of the opinion, the Court has this to say:

"It is a familiar common law rule that, where a right of relief is grounded on a negative assertion, or where a negative allegation is essential to the assertion of a right, the burden of proving the negative rests on the party asserting such right (citing many authorities) * * *.

"There is an exception to the foregoing rule, often properly applied, as follows: Where the subject-matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by the other party. See 1 Greenleaf, Ev. (14th and 16th ed.), paragraph 79; 1 Elliott, Ev., paragraph 141; 10 Ruling Case Law, paragraph 53, page 902; 3 Encyc. Ev., pp. 804-805; 22 Corpus Juris, pp. 70, 71."

In the case of *Standard Oil Co.* v. *State* (Tenn.), 100 S. W. 705, which was an action by the State against the oil company for the violation of an anti-trust statute, the Court said:

"The presumption always is that competent and pertinent evidence within the control or knowledge of a party which he withholds is against his interest and insistence."

The rule was adhered to in *Fowler Packing Co.* v. *Enzenperger*, 94 Pac. 995, where the Supreme Court of Kansas said:

"As a general rule, the omission by a party to pro-

duce important testimony relating to a fact of which he has knowledge, and which is peculiarly within his own reach and control, raises the presumption, open to explanation, of course, that the testimony, if produced, would be unfavorable to him."

The Supreme Court of Kansas in the more recent case of *Federal Trust Company* v. *Allen*, 204 Pac. 751, again emphasizes the rule:

"The established rule, at least in civil cases, and applying alike to plaintiff and defendant, is that where a party has it within his power to produce witnesses, presumably favorably disposed toward him, to explain a transaction, or answer a controverted question, and fails to do so, it will be presumed that the testimony, if produced, would be unfavorable to his side of the controversy (citing cases) * * *. Courts and text writers generally speak of it as a presumption, but it is more properly defined as an inference of fact, and not as a presumption of law. The Fowler case, *supra*, recognizes the qualification of the rule, adopted generally, that the inference will not be drawn if the failure to produce the evidence is satisfactorily explained."

The Oklahoma Courts have adopted and followed the rule in several cases, among which is *Freeman* v. *State*, 203 Pac. 1052, where the following language is found:

"The correct rule as to the presumption arising where a party fails to introduce important testimony relating to facts within his knowledge and control and peculiarly within his reach is that such failure raises the presumption, open to explanation, of course, that the testimony, if produced, would be unfavorable to him."

Hundreds of cases might be cited, but the above citations indicate the unanimous position of the courts. It

was the duty of the Government to introduce testimony as to the lawfulness of the attempted sales and purchases of livestock; it devolved upon the Government, under the circumstances, to show that such acts upon the part of the Association were not *ultra vires*. It was the duty of the Government to produce the proof, which was entirely and exclusively within its possession, knowledge and control, as to whether the stock offered for sale by the Association was the property of members of the Association, of non-members or of the Association itself. Having failed to do so, the presumption is that the evidence would have been unfavorable to the position of the Government and would have proved that the acts of the Association in attempting to sell stock were *ultra vires* because the stock was not owned by members of the Association. All of the acts of the Association in attempting to buy and sell stock being unlawful, there was no unfair or unjustly discriminatory practice or device indulged in by the appellees in refusing in concert to join with the Producers Commission Association in the doing of an unlawful act or the making of an unlawful contract. The contention of the Government must therefore fall.

But there is another very strong reason for the Court to refuse to presume that the acts of the Producers Commission Association in attempting to sell livestock to appellees were lawful acts, and not *ultra vires*. We desire to state it as the next argument in opposition to the Government's position.

Proposition III.

One presumption cannot be based upon another presumption.

ARGUMENT.

We think the simple statement of this proposition should be sufficient argument as to its soundness.

However, we call attention to the following cases and authorities:

In *United States* v. *George W. Ross*, 92 U. S. 281, 23 L. ed. 707, this Court said:

> "It is incumbent upon a claimant under the Captured and Abandoned Property Act, to establish that the property captured or abandoned came into the hands of the Treasury Agent; that it was sold; that the proceeds of the sale were paid into the United States Treasury, and that he was the owner and entitled to the proceeds thereof.
>
> "Because officers are presumed to have done their duty it is not the law that the court can conclude that the property was delivered by the military officer to a treasury agent; that it was sold by him, and that the proceeds were covered into the Treasury. The presumption that public officers have done their duty does not supply proof of a substantive fact."

In *Brady* v. *United States*, 24 Fed. (2d) 399, 403-4, the Circuit Court of Appeals for the Eighth Circuit said:

> "To maintain the judgment, we must hold that the jury were warranted in presuming from this evidence, and this evidence alone: First, that the letters were enclosed in envelopes addressed to Mergen at Beloit,

Kansas; second, that the defendants caused the letters to be duly stamped and mailed; and, third, that the postoffice at Beloit, Kan., received them and delivered them to Mergen. To do this we would have to permit presumption upon presumption * * *. It is well settled that presumptions cannot be based upon presumptions" (citing authorities).

See, also:

Schaff v. *Ferry* (Okla.), 232 Pac. 407.

Star v. *Brumley* (Okla.), 263 Pac. 1086.

Holt v. *Sather* (Mont.), 264 Pac. 108.

22 C. J. 85, paragraph 27.

In the case before the Court, we are asked to presume:

First. That the corporate entity of the Producers Commission Association had continued.

Second. We are asked to presume that the Association had a membership.

Third. We are asked to presume that the presumed membership was composed of producers of livestock.

Fourth. We are asked to presume that the marketing of livestock was one of the object stated in the Association's Articles of Association.

Fifth. We are asked to presume that the stock offered for sale by the Association was stock belonging to and produced by its presumed membership. We are asked to indulge this latter presumption as a legal conclusion in spite

of the fact that under the Oklahoma statute of its creation, the Association could with equal legality either (a) sell stock belonging to its members as the producers thereof, or (b) purchase stock from its presumed membership and sell such stock as the owner thereof.

Since either character of sale—that as agent or that as principal—would be equally legal under the Oklahoma statute, it would be just as reasonable to presume one state of facts as to presume the other. But if the second state of facts be presumed, namely, that the Association was selling its own stock, the Association would be acting in the role of a dealer and not of a market agency, and since appellees are charged with using, and were found by the Secretary of Agriculture to have used, unfair and unjustly discriminatory practices and devices against the Producers Association as a market agency, the Government would be hoist with its own petard.

The fallacy of the Government's position seems to us, in this particular, to be two-fold:

1. It asks the Court to indulge a presumption favorable to the Government's case, which is necessarily built upon other presumptions.
2. As to that pyramided presumption, the Government asks the Court to arbitrarily choose one of two presumptions equally sane, equally legal and equally reasonable, for no better reason than that it takes that particular presumption to make a case for the Government.

At page 22 of the Government's brief appellant says:

> "To justify a refusal to buy livestock from such agencies as the Producers Commission Association, having limited powers, because of the possibility of their exceeding their powers by offering livestock obtained from non-members, would exclude such co-operative marketing agencies from operating on public stockyards, although their right to do so seems to be expressly recognized by Section 306 (f)."

We dispute the contention of the appellant that the right of a co-operative marketing agency, such as the Producers Commission Association, to operate on public stockyards is expressly recognized by Section 306 (f) or by any other section of the Packers and Stockyards Act. That act is very careful not to define, in any manner, the words "Co-operative Association," as used therein, and if an association elects to organize itself under a law which so circumscribes and limits its powers that it cannot, under the law of its creation, carry on the ordinary business of a market agency, neither the Packers and Stockyards Act nor any other act, except that of the Governmental agency creating it, can imbue it with the powers of a market agency. Neither the Secretary of Agriculture, the Congress of the United States nor any other power can, by any species of declaration or fiat or order, place the flesh and blood of a market agency upon the skeleton of a so-called co-operative association, which is so limited in its powers as to be such only in name.

On the same page of appellant's brief is found this language:

> "The boycott operated against all the business of the Association. The order of the District Court leaves the Association in a position where it is subject to a boycott, although it may confine its business within the limits of its corporate authority. The boycott may continue against its legitimate business, although as disclosed by the concurring opinions below, it may be open to the Association to amend its charter under the statutes of Oklahoma so as to enable it to broaden its powers and obtain corporate authority to do all that it has done."

The reasoning of the appellant, contained in this paragraph, seems to us to be extraordinarily specious and unsound. The only acts, which are affected in the least by the Secretary's order or by the injunction granted by the District Court against the order of the Secretary, are those acts which have been committed in the past. If the Producers Commission Association is not a market agency, as we contend, and if, as we further contend, all of its acts with reference to the handling of livestock upon the Oklahoma City Stockyards are unlawful, then, of course, the effect of the order would be to declare the inability of the Producers Commission Association to act in any capacity as a market agency upon the stockyards. We think this should be the holding of this Court as to the status of that Association. If, however, the Court should hold that certain livestock operations by that Association upon the stockyards may be conducted by it as a market agency, then

the appellees could not, in any way, by the decision in this case, be protected in any unfair or unjustly discriminatory practices or devices with reference to any such future business with the Producers Commission Association as a market agency. It would simply devolve upon the Producers Commission Association in any future action, which might be brought against appellees or others under the Packers and Stockyards Act, to prove that at the time of the attempted deals with appellees or others, that Association was acting as a market agency within its legal rights and under its limited powers. The statement that a boycott may continue against the legitimate business of the Producers Commission Association by reason of any holding of the District Court or of the affirmance of the District Court's order by this Court is entirely unwarranted.

Certainly, the question as to whether or not the Producers Commission Association can, under the laws of the State of Oklahoma, amend its Articles of Association so as to enable it to broaden its powers and to obtain corporate authority to do all that it has done, has no bearing upon the question at issue now. The propositions submitted at this time do not deal with what the status of the Producers Commission Association may become in the future, but what its status was at the time covered by the Secretary's complaint. In passing, however, it might be well to state that, in our opinion, no amendment, which the Producers Commission Association can make to its Ar-

ticles of Association, will clothe it with any broader powers than it can have under the law of its creation, namely, Chapter 181, Session Laws of 1923. If the Producers Commission Association desires to be clothed with the broad powers of a co-operative corporation, in our judgment, it must again organize as a new corporation under the provisions laid down by the 1919 Act, as found in Sections 5637 to 5652 of the Statutes of the State of Oklahoma.

CONCLUSION

We respectfully submit to the Court that the decision and order of the trial court in this cause should be sustained and the case affirmed.

Respectfully submitted,

HALL & THOMPSON,
FRED E. SUITS,
Attorneys for Appellees.

SUPREME COURT OF THE UNITED STATES.

No. 513.—October Term, 1928.

The United States of America, Appellant, vs. American Livestock Commission Company; Lewis Barefoot, trading and doing business as the Barefoot Commission Company; Cassidy Southwestern Commission Company et al., etc., et al.	Appeal from the District Court of the United States for the Western District of Oklahoma.

[May 20, 1929.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a proceeding under the Packers & Stockyards Act, 1921, Act of August 15, 1921, c. 64, § 316, 42 Stat. 159, 168. U. S. Code, Title 7, § 217. The American Livestock Association and others seek an injunction against the carrying out of an order of the Secretary of Agriculture requiring them to discontinue a boycott by which they refused dealings with the Producers Commission Association at the Oklahoma National Stock Yards. A District Court of three judges granted the injunction. 28 F. (2d) 63. The United States appealed.

The Secretary found the existence of the boycott, the persistent refusal to buy or sell live stock from or to the Producers Commission Association, and that the American Livestock Association and its fellow conspirators thereby restrained commerce and discriminated unfairly against the Producers Commission Association contrary to the statute. The appellees urge that there is nothing to prevent their dealing or refusing to deal with whom they choose. But we think that it does not need argument to show that a boycott of a dealer in a stockyard may be an unfair practice under the Act as it is found to have been in this case. *Eastern States*

Retail Lumber Dealers' Association v. *United States*, 234 U. S. 600. We pass at once to the only real question in debate.

The Producers Commission Association is a cooperative association for mutual help under the laws of Oklahoma and is forbidden to "handle the argicultural or horticultural product of any non-member except for storage." It is agreed that "the record contains no evidence as to whether the live stock which the Producers Commission Associations bought or sold or attempted to buy or sell upon the Oklahoma City Stockyards was or was not the live stock of its members". It is said so far as appears all the sales were *ultra vires* and that the appellees should not be enjoined from refusing to cooperate in an illegal act. But apart from the presumption that the corporation was acting only within its powers and from the burden resting on the doer of a *prima facie* illegal act, the boycott, to justify it, we agree with the Government that it would be absurd to suppose that a cooperative society organized for the special purpose of aiding its members should confine its business to the illegal sale of the products of non-members. If not all, we must assume that some at least of its business was legitimate and that to some extent it might sell live stock that its members produced. But the boycott was general, intended it would seem to drive the Producers Commission Association out of business. That association was a competitor of the appellees and the suggestion that it was acting *ultra vires* sounds like an afterthought and cannot be supposed to have been the motive for the act. It is said that motive does not matter, but motive may be very material when it is sought to justify what until justified is a wrong. But whatever the motive nothing is shown or suggested by the evidence to justify the general boycott that the Secretary's order forbade. The Secretary's order should be enforced, but without prejudice to the right of the appellees to refuse to deal with the Producers Commission Association in matters beyond its power.

A suggestion was made that the last named association was not within the protection of the Act of Congress. We see nothing in the limitation of its powers to prevent it, the statute seems to recognize it § 306 (f), and the corporation was found by the Secretary to be a market agency duly registered as such.

Decree reversed.